

THE INDIAN LAW REPORTS, BOMBAY SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT BOMBAY, AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT.

Annes of Reporters.
PRIVY COUNCIL.
J. V. WOODHAN, Middle Temple.

HIGH COURT.

H. C. KIRKPATRICK, Lincoln's Inn (Resigned).
L. J. ROBERTSON, Middle Temple (Officiating).
GANGÁRÁM BÁPSOBA RELE,
RATANLÁL RANCHHEDDÁS,

Assistants.

VOL. XXVII.

Zublished under the Jutharity of the Governor General in Council,

THE SUPERINTENDENT, GOVERNMENT PRESS, MADRAS;
THE SUPERINTENDENT, GOVERNMENT CENTRAL PRESS, BOMBAY;
THE CURATOR OF GOVERNMENT BOOKS, NORTH-WESTERN
PROVINCES AND OUDH;

AND

THE SUPERINTENDENT OF GOVERNMENT PRINTING, BENGAL.

ADDENDUM.

[Volume XXVII, Bombay Series.]

At page 407 after the argument for the appellant insert the following:—"J M. Parikh and J. V. Desai for the respondent were not called upon."

JUDGES OF THE HIGH COURT.

Chief Justice.

SIR LAWRENCE H. JENKINS, Kt., K.C.I.E. Hon. Mr. E. T. CANDY, C.S.I. (Officiating)

B. TYABJI (Officiating).

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Hon. Mr. B. Scott (Advocate General).
Mr. C. G. H. Fawcett (Legal Remembrancer).

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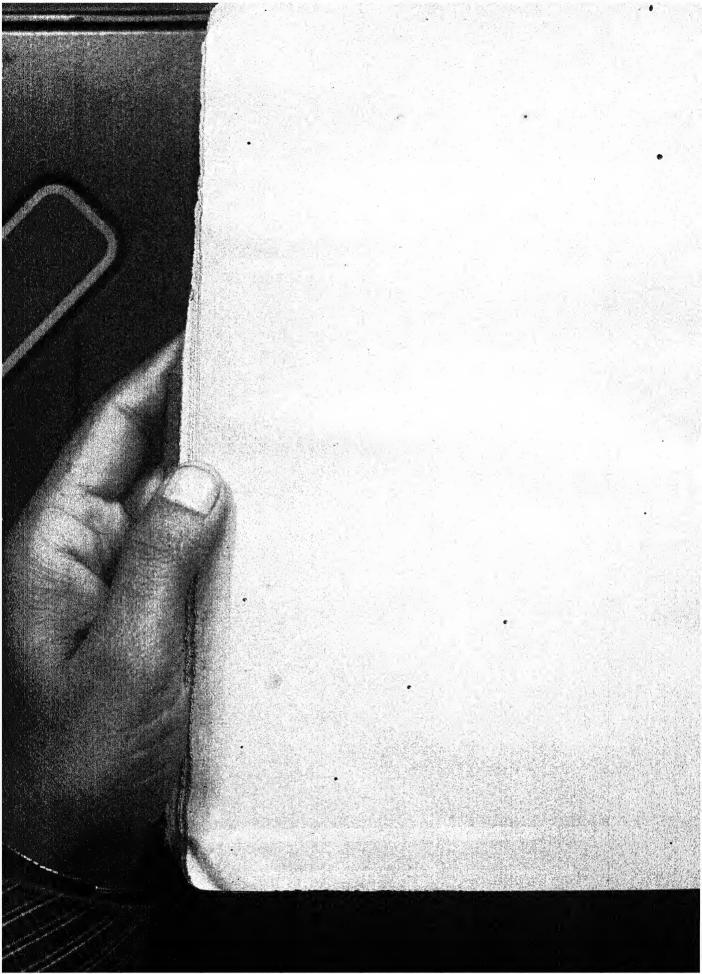
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THE

INDIAN LAW REPORTS,

Bombay Series.

FULL BENCH.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, Mr. Justice Crowe, Mr. Justice Batty, and Mr. Justice Aston.

KASHIRAM AND ANOTHER (ORIGINAL APPLICANTS), APPELLANTS, v. PANDU AND OTHERS (ORIGINAL OPPONENTS), RESPONDENTS.*

Limitation Act (XV of 1877), schedule II, article 179—Instalments— Instalment decree—Default in payment of instalments—Subsequent payment and acceptance of overdue instalments—Waiver.

A decree obtained on the 27th June, 1887, by a mortgagee against his mortgagor directed that the sum of Rs. 1,050 should be paid by yearly instalments of Rs. 55, the instalments to be paid in the month of April in each year. It further provided that, in case of default being made in the payment of any two consecutive instalments, the plaintiff should recover possession of the mortgaged property. The defendant did not pay in April, 1891, or April, 1892, the instalments due in those months as ordered by the decree, but he paid them, and they were accepted by the plaintiff, in the months of May, 1891, and May, 1892, respectively. He also paid subsequent instalments, and up to 1895 no single instalment remained unpaid at the date at which that immediately succeeding it became due. But he again failed to pay two consecutive instalments, viz., those due in 1896 and 1897, and he paid nothing subsequently. In July, 1899, the plaintiff applied for execution of the decree, contending that his right to execution arose in 1897 under the terms of the decree. The lower Appeal Court held that the plaintiff's right to execution had arisen in 1892 and that his present application was therefore barred by limitation. On appeal to the High Court,

Held, (by the Full Bench, reversing the decree of the lower Court) that having regard to the payment and acceptance of instalments in this case subset.

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Kashiram v. Pandu. quently to 1892, the parties had been remitted to the same position as they would have been in if no default had then occurred, and that on the subsequent default in 1897 the plaintiff's right to execution arose and that consequently his application in 1899 was in time.

Per Jenkins, C.J.:—The true view appears to me to be that, though there may be a failure to pay punctually under an instalment decree, still the subsequent conduct of the parties may preclude either of them from afterwards asserting that payment was not made regularly and in satisfaction of the obligation under the decree This view is not far, if at all, removed from an application of the doctrine of estoppel, for it would be but an elaboration of it to say that if each of the parties has by his acts intentionally caused the other to believe that the payment was a regular satisfaction of the obligation, and the parties have acted on that belief, neither can afterwards deny the regularity.

It is a fundamental proposition of law that payment and acceptance of overdue instalments cannot by themselves prove a waiver. The point is one to be determined on the circumstances of each case.

Dulsook v. Chugon(1) and Balaji v. Sakharam(2) commented on.

SECOND appeal from the decision of Ráo Bahádur G. D. Deshmukh, First Class Subordinate Judge of Sátára with Appellate Powers, reversing the order of Ráo Sáheb G. B. Laghate, Subordinate Judge of Karád, in an execution proceeding. Application for execution of a decree.

One Gopalji bin Bhagoji obtained a decree (No. 125 of 1887) against his mortgagor, Ramji bin Mankoji. The decree was dated the 27th June, 1887, and directed payment of the mortgage-debt by instalments payable in April of each year as follows:

The plaintiff, that is, the judgment-creditor Gopalji Bhagoji, do recover the sum of Rs. 1,050, including the costs of the suit, by instalments of Rs. 55 a year, the first instalment of Rs. 55 to be recovered in April of 1888; and so on in future Rs. 55 in April of each year until the whole amount of Rs. 1,050 is paid off. That if default be made to pay any two consecutive instalments, the plaintiff do recover possession of the mortgaged property and pay the Government assessment thereof and enjoy the profits in lieu of interest.

The first instalment, which became due in April, 1888, was paid in April, 1889; the second and third instalments were paid together in April, 1890. The next three instalments were paid in May, 1891, 1892 and 1893, and the seventh and eighth instalments were paid together in April, 1895. The instalments

due in April, 1896, and April, 1897, were not paid, nor was any subsequent instalment paid.

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The plaintiff claimed that under the terms of the decree his right to recover possession in execution of the decree arose on the defendants' failure to pay the instalment due in April, 1897. Under article 178 or clause 6 of article 179 of schedule II of the Limitation Act (XV of 1877) he was bound to apply for execution within three years from the date his right accrued. In October, 1898, accordingly, an application for execution was presented, but nothing further was done. On the 8th July, 1899, the sons and legal representatives of the plaintiff presented a fresh application to the Subordinate Judge, who ordered execution to issue if the amount due under the decree was not paid within four months. The following was his order:

There appears to be no objection on the ground of limitation as contended by the applicant (judgment-debtor).

As to the prayer of the applicant (judgment-debtor) for instalments, there is no material before the Court to show the condition of the defendants. But as the whole property of the applicant is now to go by this darkhast into the possession of the execution creditor, I would as a last resort give to the applicants four months' time for payment of the decretal debt.

Execution as prayed for to issue after four months from this date.

On appeal by the defendant Pandu, the Judge reversed this order and rejected the plaintiff's application for execution as barred by limitation. He held on the authority of Dulsook v. Chugon (1) and Hati Devchand v. Naroji (2) that the plaintiff's right to execution arose when the defendants for the first time made two consecutive defaults, viz. in 1891 and 1892, and that his present application was, therefore, too late (see article 178 and clause 6 of article 179 of schedule II of the Limitation Act, XV of 1877). In his judgment he said:

The main question to be decided in this case is whether or not the darkhast is barred by the Law of Limitation. In deciding this point it will have to be found when did the cause of executing the decree sought to be executed accrue to the legal representatives of the deceased judgment-creditor Gopalji bin

The decree sought to be executed is payable by yearly instalments of Rs. 55, with a proviso that, in default of payment of any two consecutive instalments, 1902.

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v.

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the judgment-creditor to recover possession of the mortgaged property under certain conditions. The decree has directed that each instalment shall be paid in April of each year. The whole amount of Rs. 1,050 is directed to be paid by instalments of Rs. 55 a year. The decree is dated 27th day of June, 1887. The amount will be paid off by twenty instalments. The first instalment was due under the decree in April, 1888, and the last instalment will be due in April, 1907 A.D. It appears from the decree executed that the first instalment was due in April, 1888, the second in April, 1889, the third in April, 1890, the fourth in April, 1891, and the fifth in April, 1892, and so on until April, 1907.

The legal representative of the deceased judgment-debtor has put in six receipts for the payments made by him and by his father to the deceased judgment-creditor Gopalji. These receipts show that a default was made to pay the instalment for 1891 and that for 1892. The judgment-debtor has, therefore, made two defaults, and this circumstance entitles the judgment-creditor to take possession of the mortgaged property for the remaining debt.

It is evident, therefore, that the cause to present the darkhast accrued to the judgment-creditor in April, 1892.

The darkhast, therefore, ought to have been made within three years from the dates on which the two instalments fell due and were not made. This shows that darkhast if not made in April, 1895, is evidently barred by the Law of Limitation.

The darkhast is made in July, 1899, that is, within one year from the previous darkhast, which was given in October, 1898, which was also barred by limitation. That time-barred darkhast cannot be considered to be a proper and legal step taken in executing a decree so as to allow a second darkhast within three years from that date. Article 179, schedule II of the Limitation Act (XV of 1877), clause iv, provides a limitation of three years for an application for the execution of a decree or order of any Civil Court from the date of the decree; but, where the application has been made, from the date of applying in accordance with law to the proper Court for execution or to take some step in aid of execution of the decree or order. The Bombay High Court have ruled in I. L. R. 15 Bom., page 237, that the application for execution contemplated in clause iv of article 179 of schedule II of the Limitation Act (XV of 1877) must be one made in accordance with law. This evidently means that a time-barred previous application for execution cannot give a fresh point to start for counting the limitation of three years for a subsequent like application.

Relying, therefore, on I. L. R. 2 Bom., page 356, and P. J. for 1894, page 407, I hold that the *darkhast* presented by the legal representatives of the decree-holder on the 8th July, 1899, is evidently barred by the Law of Limitation, and ought to be dismissed on that ground.

The plaintiff preferred a second appeal, which came on for hearing before Jenkins, C.J., and Aston, J. After argument their Lordships referred the case to a Full Bench for decision. The following was the referring judgment:

Kashiram v. Pandu.

JENKINS, C.J.:—This second appeal arises out of certain execution proceedings, in which it has been held that the decree-holder is barred by the lapse of time from enforcing his decree. From this he appeals.

The decree was the result of an amicable settlement, and it was thereby ordered "that the plaintiff, that is, the judgment-creditor Gopalji Bhagoji, do recover the sum of Rs. 1,050, including the costs of the suit, by instalments of Rs. 55 a year, the first instalment of Rs. 55 to be recovered in April, 1888, and so on in future Rs. 55 in April of each year, until the whole amount of Rs. 1,050 is paid off. That if default be made to pay any two consecutive instalments, the plaintiff do recover possession of the mortgaged property and pay the Government assessment thereof and enjoy the profits in lieu of interest."

The instalments were paid as follows:

1st instalment		***	22nd Apri	1, 1889.
2nd and 3rd instalments	***		17th Apri	1, 1890.
4th instalment			3rd May	1891.
5th instalment	***	***	9th May	, 1892.
6th instalment		•••	12th May	, 1893.
7th and 8th instalments	•••	• •••	16th Apri	1, 1895.

No subsequent instalment has been paid. In October, 1898, the plaintiff presented a darkhast praying for execution, but apparently it came to nothing. On the 8th July, 1899, he presented the present darkhast, but it has been held by the lower Appellate Court that it is barred by limitation.

There is no doubt there had been failure in punctual payment of two successive instalments more than three years before the presentation of the darkhast of 1898, and the question is whether, by the payment and acceptance of the several instalments as above stated, the parties have been remitted to the same position as they would have been in, if no default had occurred. There is a conflict of view as to the possibility in law of such a waiver, and in illustration of this we may (without at this stage exhaustively citing the rival authorities) point to Dulsook v. Chugon (1) on the one side and Balaji v. Sakh aran, (2) Ram

Kashiram v. Pandu. Culpo v. Ram Chunder (1) and Mon Mohun v. Durga Churn (2) on the other. Certainty as to instalment decrees is so important for the mofussil Courts, that we refer to a Full Bench the question, whether by reason of the payment and acceptance of instalments in this case the application for execution is within time.

The reference came on for argument before a Full Bench consisting of Jenkins, C.J., and Crowe, Batty and Aston, JJ.

Ganpat S. Rao for the appellants (plaintiffs): -We submit that the plaintiffs' right to execution arose under the terms of the decree on the failure of the defendants to pay the two instalments due in April, 1896, and April, 1897, and that this application is, therefore, not barred by limitation. No doubt the defendants failed in 1891 and 1892 to pay the instalments punctually and the plaintiff might then have obtained execution, but, we submit, he was entitled to waive his right; that he did so by subsequently accepting payment of the overdue instalments, but that on the later default of the defendants the plaintiffs' right to execution again accrued. The provision in the decree is for the benefit of the plaintiff and it is open to him to waive any default, and limitation will only run against him from the date of the last default which he has not waived. For a similar provision on a promissory note or bond see article 75 of schedule II of the Limitation Act (XV of 1877).

A waiver is the abandonment of a right: Selwyn v. Garfit. (3) Where a debtor pays and the creditor accepts an instalment overdue, then the creditor waives his right as against the debtor in respect of such instalments and the debt still remains payable: Cheni Bash Shah v. Kadum Mundul (4); Nilmadhub v. Ramsody (5); Ram Culpo v. Ram Chunder (1); Mon Mohun v. Durga Churn (2); Hurri Pershad v. Nasib (6); Sri Raja Fapamma v. Toleti Venkaiya (7); Sri Raja Satracherla v. Sri Raja Sitarama (8); Nagappa v. Ismail (8);

^{(1) (1887) 14} Cal. 352.

^{(2) (1888) 15} Cal. 502,

^{(3) (1888) 38} Ch. D. 273, 284,

^{(4) (1879) 5} Cal. 97, 100.

^{(5) (1883) 9} Cal. 857, 860.

^{(6) (1894) 21} Cal, 542.

^{(7) (1870) 5} M. H. C. R. 198.

^{(8) (1880) 3} Mad. 61.

^{(9) (1889) 12} Mad. 192.

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Rajeswara Rau v. Hari (1); Gyan Chund v. Jawahur (2); Radha Prasad v. Bhagwan (3); Shankar v. Jalpa Prasad (4)

The decision in Navalmal v. Dhondiba⁽⁵⁾ is in conflict with the subsequent decision in Gumna Dambershet v. Bhiku Hariba.⁽⁶⁾ The case of Dulsook v. Chugon Narrun⁽⁷⁾ was decided under Act IX of 1871. In Hanmantram v. Arthur Bowles⁽⁸⁾ there is an observation that an acceptance of an overdue instalment amounts to a waiver. The ruling in Babaji Ganesh v. Sakharam Parashram⁽⁹⁾ narrows the effect of the payment and acceptance of an overdue instalment. That case is, however, distinguishable from the present, because there the payment was on account of the whole debt and not on account of an instalment.

The principle laid down in Ramkrishna v. Bayaji, (10) Navalmal v. Dhondiba (5) and Hanmantram v. Arthur Bowles (8) is the correct principle and should be followed.

S. R. Bakhle for the respondents (defendants):—In execution of a decree there can be no waiver merely by acceptance of an overdue instalment. The principle laid down in Dulsook v. Chugon Narrun⁽⁷⁾ is correct. Article 179 of the Limitation Act does not mention waiver. That Act provides for waiver of contractual debts: see article 75. If the doctrine of waiver be applied to judgment-debts, an addition will have to be made to article 179.

When there is a specific enactment, the Court cannot act on general principles. Whether article 179 or 178 applies, the effect would be the same. The Calcutta rulings are, no doubt, against our contention. The decisions of the Madras High Court prior to Rajeswara Rau v. Hari, (1) in which there was a decree and which is distinguishable, were in cases based on contract; so also the cases of this High Court, except Dulsook v. Chugon Narrun (2) which is in our favour. In all the Bombay cases the doctrine of waiver has been applied to contract debts only. In

^{(1) (1895) 19} Mad. 162.

^{(2) (1870) 2} N. W. P. H. C. R. 83.

^{(3) (1883) 5} All. 289.

^{(4) (1894) 16} All. 371.

^{(5) (1874) 11} Bom. H. C. R. 155, 157.

^{(6) (1876) 1} Bom. 125, 130.

^{(7) (1877) 2} Bom. 356.

^{(8) (1884) 8} Bom. 561.

^{(9) (1892) 17} Bom. 555, 558.

^{(10) (1868) 5} Bom. H. C. R. 35.

Kashibam v. Pandv. Balaji Ganesh v. Sakharam Parashram⁽¹⁾ there is an expression of opinion in favour of the doctrine contended for, but the decision was on other grounds. In Hati Develand v. Naroji⁽²⁾ this Court refused to adopt the doctrine of waiver in the case of judgment-debts. The decisions of this Court have been consistent and should be followed.

Jenkins, C.J.:—From the dates on which the several instalments were paid it appears that, though certain of them were paid after the date on which they were properly due, at no time up to 1895 did any single instalment remain unpaid at the date when that immediately succeeding it accrued due. This might serve to distinguish the present case from the decision in Dulsook v. Chugon Narrun⁽³⁾; but I desire to place my decision on broader grounds, believing that thereby a solution of the difficulty attending instalment decrees will be furnished, which will be more easily apprehended by the mofussil Courts, than if I limited myself to the refinement which the distinction above referred to would involve.

Though the decree is equivocal on the point, I will assume, as most in the defendant's favour, that on two successive defaults the instalments thenceforth ceased, and the plaintiff was relegated to his right to recover the balance of the decretal sum by taking possession. And yet we find that after the default on which the defendant relies, instalments were paid by the judgment-debtor and accepted by the decree-holder; that though the first and second instalments were late, the third was paid within time; and that while the fourth to the seventh were beyond time, the eighth instalment was paid and accepted within the prescribed period.

In April, 1895, therefore, every instalment then due had been paid, and there were no arrears, so that, if limitation be reckoned from defaults after that date, the present application is within time. Must we, notwithstanding this, hold that the plaintiff is barred because his right to recover possession arose on the defendant's previous failures to make punctual payments?

(1) (1892) 17 Bom. 555. (2) P. J. 1804 p. 407. (3) (1877) 2 Bom. 356.

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In Bombay there are two difficulties in the way of our holding that the plaintiff is not barred. First, it has been held that the statute of limitation operates notwithstanding subsequent payment of overdue instalments; and, secondly, that payments of overdue instalments cannot by themselves prove a waiver. It is because of these two difficulties that this case has been referred to a Full Bench of this Court.

The origin of the view that failure to pay in accordance with the terms of an instalment decree is not affected for the purposes of limitation by subsequent payment and acceptance, is to be found in the decision in *Dulsook* v. *Chugon*.⁽¹⁾ Notwithstanding the high respect that must at all times be yielded to the opinion of the learned Judges responsible for that decision, it undoubtedly detracts from its value that the case was unargued, and this disadvantage is, I think, apparent in the somewhat inconclusive reasoning on which the opinion is supported.

In the Courts of the other Presidencies it has been repeatedly recognised, that there are pertinent considerations which were not discussed or alluded to in *Dulsook's case*. It has been said that to the general rule, by which a decree-holder would ordinarily be barred of his rights under an instalment decree, there is an exception where the default has been waived. Thus in *Mon Mohun Roy* v. *Durga Churn*⁽²⁾ it was said (page 505):

First, it is a general rule that where a decree or order makes a sum of money payable by instalments on certain dates, and provides that, on default in payment of one of the instalments, the whole of the money shall then become due and payable, and be recoverable in execution, then, under article 179 of the Limitation Act......, limitation commences to run when the first default is made.

There has, however, been engrafted upon that general rule an exception in certain cases. That exception I understand to be this, that if the right to enforce payment of the whole sum due upon default being made in the payment of an instalment has been waived by subsequent payment of the overdue instalment on the one hand and receipt on the other, then, the penalty having been waived, the parties are remitted to the same position as they would have been in if no default had occurred.

Kashiram v. Pamdu. Though it may be no more than a matter of form, I am averse to treating the operation of subsequent payment and acceptance as an exception to a general rule. It creates a doubt whether we have found the true rule. So I would venture to express the position in somewhat different language.

The true view appears to me to be, that, though there may be a failure to pay punctually under an instalment decree, still the subsequent conduct of the parties may preclude either of them from afterwards asserting that payment was not made regularly and in satisfaction of the obligation under the decree. This is illustrated by the case of Norton v. Wood, (1) where the obliged under a bond bound himself not to call in the principal for a specified period, if interest were regularly paid. On two occasions interest was paid after the due date. In delivering his judgment Lord Lyndhurst said:

The question whether payment of interest tendered after it is due and accepted by the creditor is or is not a regular payment, is one which, at law, would be left to the jury. As to the construction to be put upon the memorandum, I agree with the Vice-Chancellor, and then the only remaining question will be whether this amounts to a regular payment of the interest. Upon that point I feel myself bound to express a different opinion from that entertained by His Honor. I think, if money is tendered after the period when it became due, and the person to whom it has been paid does not see fit to refuse it, it is a waiver of the objection; it must be taken as a regular payment if the person receives it the day after without making any objection.

Here, then, we have a recognition of the principle involved in the maxim unusquisque potest renunciaré juri pro se introducto, whose modern application has been asserted by Lord Selborne in the Great Eastern Railway Company v. Goldsmith, (2) even where the jus renounced was the creature of a statute charter. It is true that in Norton v. Wood(1) the delay in payment was small, but that does not disturb the principle on which the decision rests. Also, no doubt, in that case the rights were contractual and not decretal, but this is a distinction in a circumstance not really material, for the case of Great Eastern Railway Company shows that the maxim is not limited in its operation to rights arising from convention.

An exposition of the law on the same lines is to be found in the judgment of Lord Hatherlay in *Thompson* v. *Hudson*, (1) where he says (page 17):

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It is simply (as Lord Justice Turner put it) that, upon one of the conditions being broken, a concession is made in respect of that one condition, with regard to which the appellants could never again insist upon their complete rights.

This view is not far, if at all, removed from an application of the doctrine of estoppel, for it would be but an elaboration of it to say that if each of the parties has by his acts intentionally caused the other to believe that the payment was a regular satisfaction of the obligation, and the parties have acted on that belief, neither can afterwards deny the regularity.

The vice of *Dulsook's case*⁽²⁾, as it seems to me, is that it stands on too narrow a basis: it insists on the default to the exclusion of all else; while the truer view would seem to be that default may, under the influence of after-events, cease, as between the parties, to bear that character. Whether this change has come about in any case is, in the language of Lord Lyndhurst, "to be left to the jury," that is to say, it can only be determined by reference to the circumstances of each case.

Thus to take the facts of this case. Could the decree-holder in May, 1892, have successfully applied for possession? Would he not at once have been met with the objection, "All the instalments due to this date have been paid to you, and accepted by you as such in satisfaction of the obligation created by the decree: you were only entitled to those instalments on the hypothesis that the instalments still continued payable, and could be so paid in satisfaction, and that excludes the idea that the right to take possession exists: you cannot be heard to say that there has been a default which entitles you to take possession?" I think he would: and that the objection would have prevailed. But if he could not have taken possession, he could not be barred of that right, if by default it later arose. There cannot be approbation and reprobation. The soundness of this view may be tested thus: if in this case all instalments save the last two had been punctually paid, would the unpunctual payment of those

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two, after they had in fact been paid and accepted, have entitled the decree-holder to possession? Surely not. And the reason must be, that he could not after acceptance of those instalments be heard to say, that they had not been paid and accepted as regular instalments in satisfaction of the decree.

I recognise to the full the paramount duty of keeping the decrees of the Court inviolate, but, in my opinion, there is no evasion of that duty in the application of the considerations I have discussed. The terms of the decree are not thereby modified; it is only that, in obedience to a well established principle, a limit is placed on permissible proof, so that it becomes beyond the power of the person affected to lead the evidence requisite to bring into play the particular provision of the decree, and "of things that do not appear and things that do not exist, the reckoning in a Court of law is the same" (per Lord Halsbury in Seaton v. Burnand(1)).

It is unnecessary to discuss further than they were in argument the decisions of the other Courts, not because they are undeserving of consideration—they have been most fully considered—but because there (so far as I can see) views similar to those I have expressed, though perhaps differently framed, prevail. Indeed, it is because the consensus of opinion elsewhere favours the view that subsequent payment and acceptance of overdue instalments must be taken into consideration for the purpose of applying the rules of limitation to an instalment decree, that this reference has been made; for it is, in my opinion, desirable and in the interest of justice that, so far as possible, there should be unanimity between the several Courts on those matters, where local considerations do not call for different results. It might be said that we should observe the maxim stare decisis, but, outside the realm of property law, that rule loses so much of its importance, that it ought not to weigh with us in the present case.

I now proceed to deal with the second of the two difficulties which confronted the referring Bench, viz., the opinion expressed in *Balaji* v. *Sakharam*⁽²⁾ that payment and acceptance of overdue instalments cannot by themselves prove waiver. This (if

^{(1) (1900)} App. Ca. 135 at p. 139.

^{(2) (1892) 17} Bom. 555 at p. 559.

intended to be a general proposition of law) is opposed to the view expressed in several Calcutta cases (Ram Culpo v. Ram Chunder⁽¹⁾; Mon Mohun v. Durga Churn⁽²⁾; Hurri Pershad v. Nasib Singh⁽³⁾), and in its operation conflicts with the decision of Lord Lyndhurst, which I have already cited. In my opinion the point is one to be determined on the circumstances of each case, and unless the proposition in Balaji v. Sakharam⁽⁴⁾ was intended to be limited to the facts of that case, I think it cannot be sustained, and that we should decline to follow it.

The result is that, in my opinion, we should answer the reference by holding that, having regard to the payment and acceptance of instalments in this case, the application is within time. I think we are entitled so to decide, notwithstanding that this is a second appeal, for it is a mixed question of law and fact that is involved.

I am glad that it is open to us to come to this conclusion as to the effect of waiver on instalment decrees; for, though in this case the result is that a judgment-debtor is held to his obligation, to hold otherwise, instead of being beneficial to judgment-debtors generally, would preclude decree-holders under instalment decrees, however favourably inclined, from acting with reasonableness, and would possibly in the result throw debtors (to use the language of Lord Selborne in Cotterell v. Stratton⁽⁵⁾) "into the hands of those who indemnify themselves against extraordinary risks by extraordinary exactions."

At the same time, I think it would be a wise precaution, and possibly would save litigation in the future, if judicial officers in this Presidency, in framing instalment decrees, would make it clear that the rights consequent on defaults are dependent on a positive election by those in whose interests they are intended to be created.

CROWE, J .: - I concur.

BATTY, J.:—I concur. The tender on one side and acceptance on the other of instalments as such appears to me to create an

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^{(1) (1887) 14} Cal. 352.

^{(3) (1894) 21} Cal. 542 at p. 547.

^{(2) (1888) 15} Cal. 503.

^{(4) (1892) 17} Bom. 555 at p. 559.

^{(5) (1873)} L. R. 8 Ch, 295 at p. 302.

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The theory of waiver by the plaintiff does not appear to me equally consistent with a strict construction of the decree, as that theory would require to be supplemented by a corollary that plaintiff could not only waive his right to recover in lump, but could also revive a right ex hypothesi otherwise extinguished to recover by instalments.

ASTON, J.:—I concur with the judgment of the Chief Justice and would add the following remarks.

On the point, what constitutes waiver, Mr. Rao for the appellant has cited decisions of the Calcutta, Madras and Allahabad High Courts, some with reference to instalment decrees and others with reference to instalment bonds, in some of which, from the fact of payment and acceptance of an overdue instalment, an inference has been deduced that the creditor or the decree-holder had in fact waived the benefit provided by the bond or the decree, the benefit waived being in those cases a right to recover at once all the instalments remaining due. The principal cases are discussed in Sital v. Hyder.

The Calcutta case Hurri Pershad v. Nasib, (2) an instalment decree case, does not go so far as the case of Shankar v. Jalpa Prasad (3); but it was said (p. 547): "We cannot hold that mere abstinence from suing can amount to waiver or that there can be any waiver so as to affect limitation save by payment and acceptance of an overdue instalment. Nor do we think that any distinction can be drawn between a case in which it is provided that, on payment of an instalment, the whole amount shall become due, and one in which it is provided that on non-payment of an instalment the whole amount may be sued for. There seems no reason why limitation should begin to run in the one case and not in the other." In the same case it was held that an uncertified payment, which cannot be recognised under section 258, Civil Procedure Code (XIV of 1882), may be

^{(1) (1896) 24} Cal. 281. (2) (1894) 21 Cal. 542. (3) (1894) 16 All. 371.

proved for the purpose of showing that the period of limitation did not begin to run until the default made in respect of the second instalment.

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In the Madras Presidency it was decided in Nagappa v. Ismail(1) that acceptance of the amount of an instalment in arrear, on account or in satisfaction of such arrear, amounts to a waiver within the meaning of Act XV of 1877, schedule II, article 75, so as to give a fresh starting point in limitation and to revive the right (of the debtor) to pay the debt by instalments. This decision, which is cited in Balaji v. Sakharam, (2) dealt, it is true, with a bond and not with a decree, but there is nothing in the Madras decision inconsistent with the view that, in the case of an instalment decree also, such acceptance by a decree-holder of an overdue instalment would revive in the judgment-debtor the right to pay the decreed debt by instalments, and thus not only restore the same conditions of the decree as to subsequent instalments, but also start a fresh period of limitation.

Indeed, this is the view which seems to have been accepted by this Court in Balaji v. Sakharam, (2) where the principle of decision was not that in case of an instalment decree the decree-holder has no option but to execute the decree once and for all for the whole amount due under it as provided in case of a default, but that, on the evidence, it was not proved that the decree-holder had accepted payment of an overdue instalment on account of the specific instalment in arrear so as to constitute waiver.

For the respondent, reliance was specially placed on *Dulsook* v. *Chugon*, (3) which applies to instalment decrees the principle on which *Gumna* v. *Bhiku* (4) was decided as to instalment bonds.

In Gumna v. Bhiku the plaintiff sued on a promissory note which provided for payment by instalments, with a stipulation that, in default of any one of these instalments not being punctually paid, the whole amount was to become payable at once. The plaintiff alleged that after a default the defendants made and plaintiff accepted payments. It was said in the Full Bench decision in that case: "The creditor is, no doubt, not bound

^{(1) (1889) 12} Mad. 192,

^{(2) (1892) 17} Bom. 555.

^{(3) (1877) 2} Bom. 356.

^{(4) (1875) 1} Bom. 125.

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immediately to sue for, or insist upon payment of, the whole debt. He may, if he chooses, show forbearance towards his debtor, and accept a part of what is due. But, if he does so, he does not thereby prevent, or change in any way, the operation of the law of limitation, which, notwithstanding any such subsequent wish on his part, begins to run from the time of the first default rendering the whole amount due." This Full Bench case was decided upon the Limitation Act XIV of 1859, which contained neither the provisions in section 20 nor the article 75 of the schedule II in the later Limitation Act, by which it is practically But in Dulsook v. Chugon(1) its principles were superseded. applied to a decree payable by instalments. In this case it is remarked by Westropp, C.J.: "The principles, however, on which that case (Gumna v. Bhiku(2)) was decided apply in this case. There is not in the last clause of article 167 of schedule II of the Act IX of 1871, which clause relates to decrees payable by instalments, any provision similar to that in article 75 of the same schedule with respect to promissory notes or bonds payable by instalments; where such notes or bonds provide that if default be made in payment of one instalment the whole shall be due, fixing that the period of limitation shall begin to run from the time of the first default, unless where the obligee waives the benefit of the provision, and then when fresh default is made. Nor does there appear in the new Limitation Act (XV of 1877), schedule II, article 179, clause 6, relating to decrees payable by instalments, any such provision." Accordingly, it was held that a decree payable by instalments, with a proviso that in default of payment of any one instalment the whole amount of the decree shall become payable at once, is barred if application for execution be not made within three years from the date on which any one instalment fell due and was not paid.

In Hiralal v. Budho(3) the question considered was what constitutes waiver, and the decision related to an instalment bond, not to a decree payable by instalments. The same remark applies to Devlal v. Sadashiv and to Kankuchand v. Rustomii. (5)

^{(1) (1877) 2} Bom. 356.

^{(3) (1883)} P. J. p. 172.

^{(2) (1875) 1} Bom. 125.

^{(4) (1888)} P. J. p. 381.

^{(5) (1895) 20} Bom. 109.

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In Hati Devchand v. Naroji(1) the decision related to a decree payable by instalments. The decree directed payments by annual instalments from November, 1884, and ordered that in default of payment of three instalments the whole amount shall be recovered at once by sale of the mortgaged property. instalments were not regularly paid, but between August, 1885, and November, 1891, the defendant paid various small sums. In 1893 the decree-holder applied for execution of the decree to recover Rs. 29, being the balance of the instalments which had become due till then, by the attachment and sale of the deceased defendant's moveable property. It was held that the application was time-barred, because it was not made within three years from the default in payment of the first three instalments. It must be observed, however, that the Judges who decided this case expressly stated: "In the present case we do not construe the decree as giving an option."

In the case of Balaji v. Sakharam(2) already referred to, the dispute was about execution of a consent decree for Rs. 1,800 passed in a mortgage suit, which ordered (inter alia) that the defendants should pay off the amount by annual instalments of Rs. 50 to be paid on the 30th April every year, and on their failure to pay any of the instalments within the stipulated period, the plaintiff should recover the balance of the decretal amount by the sale of the mortgaged property and from the defendants personally. The defendants made default in payment. but paid various sums later on. The plaintiff applied well within time for execution of the decree and to recover the balance due by sale of the mortgaged property and from defendants personally. The defendants pleaded waiver. No question was raised that the plaintiff was left no option under the decree to extend the time for payment of any instalment, and the decision turned merely upon the point whether there was sufficient evidence of a waiver.

If the decision in *Dulsook* v. *Chugon*⁽³⁾ was intended to rule, that in applying the law of limitation to an application for execution of an instalment decree, the Court executing the

(1) (1894) P. J. p. 407. (2) (1892) 17 Bom. 555. (3) (1877) 2 Bom. 356.

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decree must confine attention merely to the decree and to what is provided within the four corners of the Limitation Act: that, in fact, the right to apply for execution, which must accrue before limitation can begin to run, cannot be affected by the conduct or agreement of the parties to the decree, and the executing Court is therefore precluded from giving effect to legal or equitable principles derived from authority outside the sections and schedules of the Limitation Act in determining whether the rights of the parties to such a decree have been so modified by the conduct or agreement after the decree as to affect the law of limitation applicable to an application for its execution: then I think, with great deference to the authority by which Dulsook's case(1) was decided, that we may, for reasons advanced by the Chief Justice, well hesitate to accept such a proposition. It has not been expressly adopted by any subsequent decision of this Court cited during the course of the argument, and such a proposition is opposed to the principle upon which, as already shown, subsequent cases in this Court have been decided.

Now the decree of which execution is sought in the present case contains no stipulation that the whole balance of the decreed debt is to become recoverable at once in execution proceedings on the occurrence of the default mentioned in the decree. The decree is a consent decree passed in a mortgage suit. It decrees payment of a sum specified by specified instalments and it converts the mortgagee's rights to possession of his security into a conditional right, the condition precedent to the recovery of possession being default by the judgment-debtor in paying any two consecutive instalments of the debt decreed. position of a judgment-debtor, who is in default under such a decree, though not exactly the same as that of a lease-holder whose lease of immoveable property has become determined by forfeiture under clause (g), section III of the Transfer of Property Act (IV of 1882), is sufficiently analogous to make it pertinent to observe that such a forfeiture is waived by acceptance of rent which has become due since the forfeiture, or by any other act on the part of the lessor showing an intention to treat the lease

as subsisting unless such acceptance is subsequent to a suit in ejectment: see section 12 of the Transfer of Property Act. The guiding principle applicable to the question appears to me to have been laid down in Ramkrishna v. Bayaji, (1) where it was said by Couch, C.J., and Newton, J.: "Although the instalments were not paid by the defendant at the time fixed for payment, yet the defendants having paid the money on account of them, and the plaintiff having accepted it, the payments must be considered as regards both the parties as if made at the time fixed, and the plaintiff cannot take advantage of the stipulation that the sum should become due on failure to pay any instalment, or the defendant rely upon it as making the whole debt due and fixing the period from which the time of limitation ran." That view was accepted by the Legislature as regards instalment bonds after a contrary opinion was expressed in the Full Bench decision Gumna v. Bhiku, and the Limitation Act (XV of 1877) does not appear to contain any provision which prevents the application of the same principle to instalment decrees. But it is a view, which, in my opinion, is not based solely upon the doctrine of waiver. Where there exists no right, there, I apprehend, can be no waiver. The learned Chief Justice has already pointed out that under a decree framed in the same words as the one under consideration, there might conceivably be no default except as to the last two instalments, which the decree-holder might accept when overdue. If such a decree-holder, after such acceptance, were, nevertheless, to apply for possession of the land, because the decree awards such possession on default of payment of any two instalments, the plea of the judgment-debtor would presumably be satisfaction, not waiver; there being no right left to be waived if the conditional right to possession of the land as security has ceased to exist as soon as the debt decreed itself is fully discharged, and the security is extinguished.

To take another illustration. Suppose the decree had ordered payment of the whole decreed debt on a specified date and had provided that the creditor was to take possession in default of such payment. If such a decree-holder were to accept the whole

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Kashiram v. Pandu, sum due under the decree after due date and were nevertheless to apply for possession, the defence to such a claim would again presumably be satisfaction and not waiver, when the decreed debt is discharged and the security is extinguished.

The question thus arises whether any essential difference exists when the decreed debt is divided into instalments payable at stated intervals with the same provision as to recovering possession in execution when there is default in paying any two Such a decree would be satisfied for consecutive instalments. the time being by payment of the instalments on the dates specified, and if it would not be straining the interpretation of such a decree to treat it as satisfied for the time being if the decree-holder accepts all the instalments which have fallen due, though overdue at the time of acceptance, then in such cases alone there would be no right to possession and no scope therefore for waiver, if such right is lost by acceptance whether intended to be waived or not. On the other hand, if the decree made all the remaining instalments payable on the occurrence of a default specified (which the decree under consideration does not do), then, too, if we accept the principle laid down in Ramchandra v. Bayaji,(1) the Court to which application for further execution of the decree is made may well say to the decreeholder: "The judgment-debtor is not in default, the payments you have chosen to accept before making your application must be treated as if made at the time fixed in the decree, and the decree is therefore satisfied for the present and not capable for the present of further execution."

Under this view, which appears to me to be both reasonable and sound in principle, it would be immaterial whether the decree awarded possession or made all remaining instalments at once recoverable on the occurrence of the default specified.

I therefore fully agree with the reasons given by the learned Chief Justice for answering the reference in the terms proposed.

^{(1) (1868) 5} Bom. H. C. R. (A. C. J.) 35.

APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Batty.

1902. September 1.

TRIMBAK TUKARAM NAIK AND OTHERS (OBIGINAL DEFENDANTS), APPELLANTS, v. BHAGCHAND AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.**

Contract Act (IX of 1872), section 74—Bond—Instalments—Failure to pay instalments—Interest at a higher rate from the date of the transaction—Penalty.

Defendants borrowed a sum of Rs. 200 from the plaintiffs and gave a bond dated the 12th December, 1879, for Rs. 250, repayable by monthly instalments of Rs. 5. The bond provided that, in case of default in payment of any instalment, interest at 24 per cent. per annum should be charged from the date of the bond. The sum of Rs. 203-2-9 was paid by defendants up to the 9th July, 1884, after which date no payments were made. The plaintiffs claimed interest from the defendants at the rate of 24 per cent. calculated from the date of the bond.

Held, that the provision in the bond that, on default, interest at 24 per cent. per annum should be charged from the date of the bond was in the nature of a penalty; and that the amount claimed could not be recovered.

Appeal from the decision of T. D. Fry, District Judge of Násik, confirming the decree passed by Ráo Sáheb R. T. Kirtane, Subordinate Judge of Málegaon.

On the 12th December, 1879, the defendants borrowed Rs. 200 from the plaintiffs and gave them a bond for Rs. 250, agreeing to repay the plaintiffs Rs. 250 by instalments of Rs. 5 per month until the whole was paid off.

The bond also provided that, in case of failure to pay any instalment, the defendants should pay interest on the principal sum of Rs. 200 at the rate of 2 per cent. per month from the date of the bond.

The first instalment was paid on the 10th February, 1880, and from that date down to the 9th July, 1884, the defendants paid to plaintiffs Rs. 203-2-9 in instalments of different amounts and at irregular intervals.

On the 1st November, 1898, plaintiffs filed this suit to recover Rs. 400 from the defendants. The claim was made up as follows:

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Principal Rs. 200. Interest at the rate of 2 per cent. per month, Rs. 403-2-9: total Rs. 603-2-9. Deducting Rs. 203-2-9 received as interest, the sum remaining due and claimed was Rs. 400.

Defendants 2 and 3 contended that the only balance remaining due was Rs. 46-13-3 and that the covenant in the bond providing for 24 per cent, interest was penal and could not be enforced.

The Subordinate Judge awarded the plaintiffs' claim.

On appeal, this decree was confirmed by the District Judge.

The defendants appealed to the High Court.

R. R. Desai for the appellants (defendants).

There was no appearance for the respondents (plaintiffs).

CROWE, J.:—The mortgage-bond on which this suit was brought shows that the sum of Rs. 203-2-9 was paid by the debtor up to 9th July, 1884, as the payments to that amount are endorsed on the bond. It must be held, then, that the plaintiffs have condoned any default made by defendants in payment up to that date.

The balance due on the bond is Rs. 46-13-3. The provision that on default interest at 24 per cent. should be charged from the date of the transaction is clearly of the nature of a penalty. The most the plaintiffs are entitled to is Rs. 46-13-3 plus an equivalent sum according to the principle of damdupat by way of interest.

We amend the decree of the lower Appellate Court by ordering that defendants be allowed to redeem the mortgage on payment to plaintiffs of Rs. 93-10-5 within six months from this date. Costs of this appeal on the plaintiffs.

Decree amended.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Aston.

PANDURANG BABU PARAB (ORIGINAL DEFENDANT), APPELLANT, v. MAHADAJI MORESHVAR GOKHALE (ORIGINAL PLAINTIFF), September S. RESPONDENT.*

1902.

Mortgage-Redemption-Interest on mortgage-debt-When interest ceases to run—Deposit by mortgagor under section 83 of Transfer of Property Act (IV of 1882)—Duty of mortgagor making such deposit when mortgagee is a minor-Appointment of guardian ad litem-Transfer of Property Act (IV of 1882), sections 84 and 103.

On the 25th October, 1893, the plaintiff passed a mortgage-deed to the defendant, which provided that in case of redemption the mortgagor should pay interest for the whole year in which such redemption should take place. On the 12th October, 1899, the mortgagor, with a view to redeem, deposited in Court, under section 84 of the Transfer of Property Act (IV of 1882), the sum of Rs. 2,000, which was the whole amount due on the mortgage for the then current year ending 24th October, 1899. The mortgagee was then dead, and his son and heir was a minor, and it was therefore necessary that a guardian ad litem should be appointed to receive notice of the deposit as required by section 83. Steps were accordingly taken to appoint the minor's mother, and on the 18th November, 1899, she was duly appointed guardian ad litem. Notice was then served upon her, calling on her to show cause why she should not receive the deposit. The notice was made returnable on the 9th December, 1899, on which day she refused to accept the deposit, on the ground that it did not include the interest which had accrued due for the year commencing 25th October, 1899. The deposit was consequently returned to the plaintiff, who then filed this suit for redemption. The Subordinate Judge passed a decree directing redemption on payment to the defendant of Rs. 2,000 and also interest for the year commencing 25th October, 1899. The District Judge varied this decree, refusing to give the additional interest, holding that "on making the deposit the plaintiff (mortgagor) had done all that had to be done by him " to enable the defendant to take the deposit out of Court as provided by section 84 of the Transfer of Property Act (IV of 1882) and that therefore interest had ceased to run. On appeal to the High Court,

Held, (reversing the decree) that the defendant (mortgagee) was entitled to the additional interest. The defendant (mortgagee) was a minor. It was therefore requisite that a guardian ad litem should be appointed both to receive service of the notice of deposit under section 83 and to take the deposit out of Court. It could not be said that the mortgagor (plaintiff) had completely performed his part until he had procured the appointment of a guardian

^{*} Second Appeal No. 451 of 1901.

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ad litem for the above purpose. This was not done prior to the 25th October, 1899. Consequently the mortgagee was entitled under the mortgage to the interest for the year commencing on that day.

SECOND appeal from the decision of Mr. T. Walker, District Judge of Ratnágiri, varying the decree of Ráo Sáheb Narayan B. Brahme, Subordinate Judge of Vengurla.

Suit for redemption. On the 25th October, 1893, the plaintiff mortgaged certain property to Baba Krishnaji, the father of the minor defendant, for Rs. 2,000. The mortgage-deed contained the following provision with regard to payment of interest and redemption:

On your aforesaid amount we have agreed to pay you interest at the rate of one *khandi* and ten *maunds* of rice in *kudali* measure per cent. per annum, that is, seven and a half *pharas* of rice. You should appropriate (the said quantity of rice) every year from the income of the mortgaged property till redemption.

For the (redemption of this) mortgage a period of four years is fixed from this date. After the stipulated period we shall pay the whole amount, and the rice for interest of the (whole) year (in which the property will be redeemed) up to this date (that is, the 25th October) will be allowed to be enjoyed by you, and (then) we shall redeem the property.

On the 12th October, 1899, the plaintiff, under section 83 of the Transfer of Property Act (IV of 1882), deposited Rs. 2,000 in Court, stating that all the interest due up to that date had been paid.

At the date of the deposit Baba Krishnaji, the mortgagee, was dead, and his son and heir, the present defendant, being a minor, it was necessary that a guardian should be appointed upon whom the notice of deposit could be served as required by the section. A notice was, therefore, served on the minor defendant's mother Sundrabai, calling upon her to state whether she was willing to act as guardian. This notice was made returnable on the 18th November, 1899. On that day Sundrabai appeared in Court and consented to act. Thereupon notice of the deposit was duly served upon her under section 83 of the Transfer of Property Act. This notice was made returnable on the 9th December, 1899. On that day Sundrabai appeared as guardian and refused to accept the Rs. 2,000 deposit on the ground that, under the terms of the mortgage, interest was due for the year

commencing the 25th October, 1899, and had not been paid. The deposit was thereupon returned to the plaintiff.

The plaintiff then filed the present suit for redemption.

The defendant answered that he did not object to the redemption of the mortgage, provided the plaintiff paid the Rs. 2,000 and interest for the whole year in which the mortgage was redeemed, i.e., the year commencing the 25th October, 1899.

The Subordinate Judge passed a decree ordering payment to the defendant of the principal, Rs. 2,000, and interest for the year commencing 25th October, 1899. Payment to be made on or before the 25th October, 1900, on default right to redeem to be foreclosed.

On appeal by the plaintiff, the Judge varied the decree and directed redemption on payment of the Rs. 2,000. He was of opinion that the plaintiff (mortgagor) who had deposited the Rs. 2,000 in Court on the 12th October, 1899, "had done all that had to be done by him to enable the defendant to take the deposit out of Court," and that under section 84 of the Transfer of Property Act interest on the Rs. 2,000 had ceased to run at the date of deposit.

The defendant appealed to the High Court.

N. M. Samarth for the appellant (defendant):-The defendant has received interest up to the 25th October, 1899, and the question is whether he is entitled to interest for the following The plaintiff contends that under section 84 of the Transfer of Property Act interest ceased when he deposited the Rs. 2,000, principal, in Court, the interest then due being paid. That deposit was, no doubt, made on the 12th October, 1899. But the defendant was a minor and no guardian was appointed for him until the 18th November, 1899, and therefore no effective notice of the deposit as required by the section could be given to the defendant until then. But at that date another year had begun and under the terms of the mortgage-deed the defendant had become entitled to claim interest for that year which commenced on the 25th October, 1899. Consequently, the defendant through his guardian was justified in refusing to accept the deposit. Without the further year's interest it was not sufficient to pay off the mortgage-debt. The plaintiff ought to have taken 1902.

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steps under section 103 of the Transfer of Property Act to have a guardian ad litem appointed for the purpose of receiving the notice of deposit. This should have been done and notice of deposit should have been given to the guardian so appointed before the 25th October, 1899, in order to prevent the accrual of another year's interest. The plaintiff not having done this, he cannot be said to have done all he could have done to enable the defendant as mortgagee to take the deposit out of Court as required by section 84, and therefore interest on the principal debt still continued to run. Notice by the mortgager to the mortgagee seems to be necessary in order to stop interest: Sitaramayya v. Venkataramanna. By section 83 interest is to cease from the date of tender, not from date of deposit. No effective tender was made here. We, therefore, claim interest on the principal for the year commencing 25th October, 1899.

H. C. Coyaji for the respondent (plaintiff):—When the plaintiff deposited the principal money (Rs. 2,000) in Court on the 12th October, 1899, and applied to the Court to issue notice of the deposit to the defendant, he had done all that the law required him to do, and thereupon interest on the mortgage ceased to run under section 84. It is for the mortgagor to deposit the money, but it is for the Court to give notice of deposit. The mortgagor is not responsible for any delay that may take place in giving notice of deposit. The delay might arise from causes wholly beyond his control. Section 103 of the Transfer of Property Act does not make an application for the appointment of a guardian ad litem a condition precedent to a valid deposit.

Jenkins, C.J.:—The plaintiff is the mortgagor and the defendant the mortgagee of the plaint property. The mortgage-deed is dated the 25th October, 1893, and it is thereby provided that the mortgagor is not entitled to redeem after the 25th October, 1899, without paying interest to the 25th October, 1900.

On the 12th October, 1899, the plaintiff deposited in Court the Rs. 2,000 then due on the mortgage, but the mortgagee being a

minor the appointment of a guardian ad litem for the purpose of receiving notice of the deposit was necessary. Accordingly notice was issued to the minor mortgagee's mother, Sundrabai, with a view to obtaining her consent to be appointed guardian ad litem of her son, and it was made returnable on the 18th of November. On that day Sundrabai appeared and was appointed guardian ad litem. Then a notice was issued to Sundrabai calling on her to show cause why she should not receive the deposited money, and this was made returnable on the 9th of December. When the matter came on, she refused to accept the money in full discharge of the amount due on the mortgage, inasmuch as it did not include interest subsequent to 25th October, 1899. Thereupon the deposited amount was returned to the plaintiff and this suit was instituted.

The first Court held the deposit under section 83 of the Transfer of Property Act insufficient, and therefore decreed redemption on payment of Rs. 2,171-6-10, ordering that the defendant should recover his costs from the plaintiff. The District Judge on appeal, however, held that the mortgagor had done all that had to be done by him to enable the mortgagee to take the money out of Court, and ordered the plaintiff to pay Rs. 2,000 into Court within six months and redeem the property.

The District Judge has applied the right test; the only question is, whether it has been properly applied. Now it must be noted, that, though section 84 provides that interest shall cease from the date of the tender, it does not provide that it shall cease from the date of the deposit; in the case of a deposit it only ceases as soon as the mortgager has done all that has to be done by him to enable the mortgagee to take the amount out of Court, that is to say, he must do something more than make a deposit. We have then to see what additional duty is thus cast on a mortgagor, when the mortgagee is an infant.

Section 103, dealing with the case of a person incompetent to contract, provides that where there is no curator of such person's property, and it is requisite or desirable in the interest of such person that a notice should be served, or a tender or deposit made, application may be made to the Court to appoint a guardian ad litem for the purpose of serving or receiving service

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of such notice, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts, which could or ought to be done by such person, if he were competent to contract. I pause here for a moment to notice the words requisite or desirable in the interests of such person, as it has been suggested that they obscure the meaning of the section. On a fuller consideration I am of opinion that this is not so, and that they are designedly used in reference to distinct events. I will make my meaning plainer by an illustration. If where the mortgagee is a minor it is determined by the mortgagor to proceed under sections 83 and 84, then it is requisite that a notice should be served; if in the case of an infant mortgagor those entrusted with the care of his affairs consider the mortgage money should be tendered or paid, then it may be desirable in the interests of the minor that this should be done. Here it was requisite that the notice should be served, for the Act makes the service imperative, and so a guardian ad litem had to be appointed both to receive service of the notice and to take the deposit out of Court.

Now for the mortgagor it has been urged by Mr. Coyaji, who has argued the case with his usual clearness and care, that his client had performed his part when on the 12th October he applied for a guardian: that the rest lay with the Court. In support of this view he relies on the frame of section 83, from which it is apparent, he argues, that when the mortgagor has made his deposit, the service of notice is a duty cast on the Court: and yet he concedes that it is manifest from the terms of section 84 that mere deposit does not result in a cessation of interest.

It is desirable to start from some sure basis, and that which suggests itself to me as pertinent to this enquiry is a correct appreciation of the position of a mortgagee. That position in relation to a tender is thus described by Lord Macnaghten in Bank of New South Wales v. O'Connor (1): "A mortgagee is entitled to his principal and interest and the ordinary charges and expenses connected with his security. He is also entitled as of right to the costs properly incident to an action for foreclosure or redemption, though he may forfeit those costs by misconduct,

and may even have to pay the costs of such an action in a case where he has acted vexatiously or unreasonably." What we then have to see is how far this position is invaded by sections 83 and 84 of the Transfer of Property Act, bearing in mind that so far as the cessation of interest on tender goes, the provision is but an expression of the general law, while the direction for its cessation in the case of a deposit is an adaptation of an early regulation.

The sole question appears to me to be, whether it was not incumbent on the mortgagor, in the circumstances of this case, not only to apply for a guardian ad litem, but also to see that one was appointed. It is clear that for the purposes of a tender under this chapter of the Transfer of Property Act it would be incumbent on a mortgagor to procure the appointment of a guardian ad litem: till such an appointment had been made there was no one to whom under the Act a tender on behalf of the minor could be made. Does not this furnish us with some clue as to the measure of the mortgagor's duty for the purpose of a deposit? I think it does, though I concede that the analogy is not perfect. Until a guardian ad litem has been appointed; all has not been done to enable the minor mortgagee to take the money out of Court. Something more remains to be donethe appointment of a guardian ad litem. Can the mortgagor claim that he has completely performed his part when he has made his application? Suppose, for example, that the guardian proposed by the mortgagor were to refuse to act, would nothing remain to be done by the mortgagor? Surely it would be incumbent on him to propose some other guardian, because it is his duty, as it would be under section 31 of the Code of Civil Procedure, to see that a guardian ad litem is actually appointed. for until then there is no one on whom the requisite notice can be served, or authorized to take the money out of Court. It is true that the language of the Legislature is not specific on this point, but any other view might operate hardly on those, who from personal incapacity cannot protect themselves, whereas a construction that would impose on the mortgagor the duty of seeing that a guardian is appointed involves no practical detriment to him if he acts with prudence. Thus it was open to the

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Pandurang v. Mahadaji. mortgagor in this case to have moved with sufficient promptness to secure that a guardian should have been appointed in time. I am even inclined to think that he might have made his application for a guardian before depositing his money, for the Act does not dictate any order of sequence, and it is obvious that in the case of an infant mortgagor the application for a guardian must precede the deposit. The whole trouble in this case arises from the fact that the notice in reference to the appointment of a guardian was made returnable at so late a date as the 18th of November. It is much to be regretted that so distant a date should have been fixed, and I think the Courts should strive to dispose of matters of this kind with greater promptness than has been shown in this case.

The balance of convenience appears to me to favour the view that the mortgagor had not done all that had to be done by him until he procured the appointment of a guardian ad litem, and where language is not precise, it is permissible to attribute that effect to it which best accords with convenience and justice, for an argument drawn from inconvenience is forcible in law. There is certainly enough of doubt in the language of the Act to permit of the application of this principle. In coming to this conclusion I have not overlooked the arguments based on section 102, but they are, in my opinion, outbalanced by the considerations which have led me to the result I have expressed.

Under these circumstances the decree of the District Judge must be reversed and a decree passed for redemption on payment of additional sums of Rs. 367-11-11 and Rs. 223-1-9, being the amount of costs, together with interest on this latter amount at the rate of 9 per cent. until payment. Respondent to pay costs throughout.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Batty and Mr. Justice Aston.

JOITARAM RAMKRISHNA (ORIGINAL PLAINTIFF), APPELLANT, v. RAMKRISHNA NANDLAL AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1902. September 12.

Hindu Law—Gift—Donor not in possession—Donee not placed in possession—Gift of an undivided share—Stranger to the gift disputing its validity—Adverse possession—Limitation—Misjoinder of parties—Plaintiff's discretion as to addition of parties—Practice—Procedure.

The plaintiff's father and uncles were members of a joint Hindu family, but in 1870 they separated and partitioned the family property with the exception of certain land, which was kept joint and was applied to the maintenance of their mother during her lifetime. It remained in the possession of the plaintiff's father, who was the eldest of the family. The mother died in 1877, but the land still remained joint and continued in the possession of the plaintiff's father. On 15th November, 1877, the plaintiff's uncles M. and J. by a registered deed gave to their nephew, the plaintiff, their undivided shares in this land. They were not, as already stated, in possession and they did not deliver possession of their shares to the plaintiff or to any one on his behalf. The plaintiff's father (their co-sharer) was in possession and he continued in possession after the gift was made. The plaintiff was at that time, and until 1892, a minor and lived with his father as a member of a joint family. On the 1st January, 1887, his father mortgaged the whole of the land to the second defendant, who at once entered into possession. Subsequently the land subject to this mortgage was sold in execution of a decree against the plaintiff's father and was purchased by one Kirpashankar Ranchhor. In 1892 the plaintiff attained his majority and on the 2nd January, 1899, he filed this suit against his father (defendant 1) and his father's mortgagee (defendant 2) to recover the land which had been given to him on the 15th November, 1877. Kirpashankar was not made a party to this suit. The lower Court rejected the plaintiff's claim on the ground that the gift to the plaintiff by M. and J. of their undivided shares of land not in their possession, and of which the plaintiff was not put into possession, was invalid. They also held that Kirpashankar should have been a party and that the plaintiff's claim was barred by limitation inasmuch as the mortgagee had held adverse possession since 1st January, 1887, i.e., more than twelve years. On appeal to the High Court,

Held, (reversing the decree of the lower Court) that-

(1) The gift to the plaintiff in 1877 was valid. The donors, in relinquishing their claim to their undivided shares, had done all that was practically necessary, and by the registered deed of gift had done all that they could do,

^{*} Second Appeal No. 563 of 1901,

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- and the possession of the father was practically the only mode in which the plaintiff, who was then an infant, could accept or exercise possession. The donors never objected and made no attempt to revoke their gift. No division was necessary, as the whole of the land was in the possession of the plaintiff's father.
- (2) The fact that the shares were undivided did not render the gift invalid. This was not a gift by members of an undivided family to an outsider as in Vrandavandas v. Yamınabai. (1) It was a gift by persons who were not members of an undivided family (the plaintiff's uncles having previously separated from his father) to the plaintiff, a member of another coparcenary. No consent was necessary to validate the alienation, nor was there any one who did or could object.
- (3) The plaintiff's claim was not barred by limitation. The property did not pass to the mortgagee until 1st January, 1887, and this suit, instituted on 3rd January, 1899, allowance being made for the vacation, was therefore in time.
- (4) The auction-purchaser was not a necessary party. The plaintiff was not bound to sue every possible claimant to the land. If he chooses to leave the question that might arise between him and the auction-purchaser to future settlement, he did it at his own risk. He was dominus litis.

SECOND appeal from the decision of S. L. Batchelor, District Judge of Ahmedabad, confirming the decree passed by Ráo Sáheb Atmaram Jamnadas Kaji, Subordinate Judge of Umreth.

Suit to recover possession of land.

The land in suit originally belonged to one Nandlal, who had four sons, viz., Ramkrishna, Jethalal, Mayaram and Chhaganlal. The eldest son Ramkrishna had one son, Joitaram (the plaintiff).

On the 2nd June, 1870, the property left by Nandlal on his death was divided by his said four sons, except the land in dispute and some other property which was kept joint and was applied to the maintenance of their mother during her lifetime, but it was agreed that after her death it should be divided equally among them, and her funeral expenses were to be defrayed by them in equal shares. Ramkrishna, the eldest brother, remained in possession of this undivided property.

The mother died in 1877. The said property was not divided after her death. By a deed of gift dated the 15th November, 1877, Mayaram and Jethalal made over their shares of the undivided property to their nephew Joitaram (the plaintiff), the son

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of Ramkrishna (defendant 1). At the date of gift Ramkrishna (defendant 1) was still in possession and enjoyment of the said property, and he continued in such possession subsequently to the said gift. Joitaram, his son (the plaintiff), was then a minor and was living with his father as a member of a joint Hindu family.

and was living with his father as a member of a joint Hindu family.

On the 1st January, 1887, Ramkrishna (defendant 1) mortgaged the land in dispute to the second defendant, who at once

entered into possession and enjoyment thereof.

Subsequently in execution of a decree against Ramkrishna (defendant 1) the said land was sold subject to the said mortgage,

and was purchased by one Kirpashankar Ranchhor.

The present suit; which was filed on the 3rd January, 1899, (the date of the mortgage) was brought by the plaintiff Joitaram, who attained his majority in 1892, against his father, Ramkrishna (defendant 1) and his (Ramkrishna's) mortgagee (defendant 2) to recover the property given to him as above stated on the 15th November, 1877, by his uncles Mayaram and Jethalal.

As the Courts were closed for the Christmas vacation the suit was not filed until the 2nd January, 1899.

Defendant 1 admitted plaintiff's claim.

Defendant 2 (the mortgagee) contended that the gift relied upon by plaintiff was invalid, as neither the plaintiff nor his grantors ever had possession of the land. The land was in possession and enjoyment of Ramkrishna (defendant 1), who mortgaged it to him for valuable consideration. He further submitted that the auction-purchaser Kirpashankar Ranchhor was a necessary party to the suit.

The Subordinate Judge held that the gift to plaintiff was not valid; that the donors were not in possession of the property given; that Ramkrishna (defendant 1) was competent to mortgage the land; that the suit was time-barred; that the auction-purchaser was a necessary party, and the suit was therefore bad for misjoinder. In his judgment he said:

Gift of the property of which the donors themselves were not in possession and the possession of which was not and could not be given to the donee is invalid. Gift of an undivided share is also invalid, the plaintiff being not a member of the family..... The plaintiff and defendant 1 are a son and a father. They admittedly live together, the defendant 1 being manager of the family.....

JOITARAM v. Ramkrishna. The defendant 1 pays the land assessment and enjoys it at least since 1883. Thus, apart from the question of invalidity or otherwise of the gift, plaintiff's claim is clearly time barred. He silently allowed the mortgagees to believe that his father was absolute owner to deal with, and on the faith of such a belief the mortgagee was induced to advance money, which he could not be Ceprived of by the collusion of the father and son The purchaser is, of course, a proper and necessary party. See I. L. R. 16 Bom. 608.

On appeal this decree was confirmed by the District Judge. The plaintiff preferred a second appeal to the High Court.

L. A. Shah for the appellant (plaintiff):—The lower Courts have erred in holding that the suit is bad for non-joinder of parties. The auction-purchaser is not a necessary party as he is not in possession, and by this suit the plaintiff seeks to recover his property from the mortgagee in possession. If necessary, the plaintiff should now be allowed to make the auction-purchaser a party.

The lower Courts were wrong in holding that the gift was invalid. The donors did all they could under the circumstances to convey their share by the deed of gift to the plaintiff. Delivery of possession is not essential to the validity of the gift. As the gift was to a member of the family to which the other coparceners did not object, it was not invalid. The gift of an undivided share would be invalid only if it were made to a stranger without the consent of the other coparceners. Again, the mortgagee (defendant No. 2) must be deemed to have notice of the registered deed of gift, and he cannot object to the validity of the gift. The objection could only be raised, if at all, by the donors and not by a third party. See Balmakund v. Bhagwandas (1); Lakshimoni Dasi v. Nittyananda Day (2); Kalidas Mullick v. Kanhaya Lal Pundit (3); Mayne's Hindu Law, 6th Edition. section 377; Vasudev v. Narayan (1); Vrandavandas v. Yamunabai.(5)

As regards the question of limitation, the suit is within twelve years from the date of the mortgage to defendant 2. The possession of Ramkrishna (defendant 1) was in no way

^{(1) (1894) 16} All. 185.

^{(3) (1884) 11} Cal 121.

^{(2) (1892) 20} Cal. 464.

^{(4) (1882) 7} Bom. 131.

^{(5) (1875) 12} Bom. H. C. 229.

adverse to plaintiff, who was living with his father Ramkrishna (defendant 1), and who was admittedly a minor up to 1892.

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G. K. Parekh for respondent (defendant 2):—The auction-purchaser is a necessary party, being interested in the property, the subject-matter of the litigation.

The lower Appellate Court has found that Ramkrishna (defendant 1) has been in adverse possession of the land for more than twelve years. This being a finding of fact, it must be accepted as final in second appeal.

The gift is not valid, as there was no delivery of possession, which is necessary to constitute a valid gift. There is no evidence of the delivery of the deed of gift to the plaintiff. It is also invalid as being the gift of an undivided share by a coparcener. No steps seem to have been taken by the donors to complete the gift.

BATTY, J.:-In this case the plaintiff seeks to recover possession of a certain portion of land which originally formed part of the joint ancestral property of his father (the defendant No. 1) and his father's brothers. In 1870 plaintiff's father and the brothers of plaintiff's father separated in interest, but the field of which the land in suit forms part was provisionally assigned for the maintenance of their mother, and therefore was not at the time partitioned. Subsequently, after the death of the mother, the plaintiff's uncles executed, as to their unpartitioned share in that field, a document in favour of the plaintiff, then an infant, purporting to be a deed of gift. The document is Exhibit 17. It is dated 15th November, 1877, and was duly registered. According to its provisions the plaintiff's mother was to be the guardian of the plaintiff for the purposes of that property. It is not alleged that the plaintiff's uncles ever themselves enjoyed personally possession of the land in question, or delivered possession thereof to the plaintiff orto any one on his behalf. The plaintiff's father who was in possession remained in possession, paid the assessment and apparently had undisturbed management. In 1885 the plaintiff's father executed a mortgage, which included the property in suit. This mortgage was without possession.

Joitaram v. Ramkrishna, On 1st January, 1887, the mortgage of 1885 was redeemed by moneys obtained from defendant No. 2, advanced on a mortgage with possession of the same land.

The plaintiff attained majority in 1892 and instituted the present suit on 2nd January, 1899, making his father a party thereto as well as defendant 2, the mortgagee before mentioned.

It appears that a third person not joined in this suit had bought the right, title and interest of the defendant No. 1 in the property in question at an auction-sale, and the lower Courts held that this auction-purchaser was a necessary party to the suit.

The main grounds of the defence were, however, that the gift was invalid both because it was unaccompanied with possession and because it purported to be the gift of an undivided share, and that more than twelve years of adverse possession barred the plaintiff's claim to disturb the mortgage in which it was suggested he had acquiesced.

The leading cases on the question whether delivery of possession is necessary to the validity of a gift by a Hindu donor appear to be the Privy Council cases Kalidas Mullick v. Kanhaya Lal Pundit (1) (followed in Ugarchand v. Madapa (2)) and Nawab Ibrahim Ali Khan v. Ummatul Zohra,(3) The first-mentioned of these corrected the error in Kachu Byaji v. Kachoba Vithoba (1) that delivery of possession was indispensable to the validity of a sale under Hindu law. Their Lordships pointed out that the error appears to have arisen from a misconception as to what had been decided in Harjiwan Anandram v. Naran Haribhai, (5) the real point in which was that the alleged donor had reserved his jus disponendi, had denied the fact of the gift and had continuously received the rent for the subject-matter. These last-mentioned circumstances were emphasised as differentiating that case from one in which the donor had done all she could to complete the gift, was a party to the suit and admitted the gift to be complete. (6) Their Lordships also pointed out, as contributing to the error, the misleading nature of the head-note

⁽I) (1884) 11 Cal. 121 s.c. L. R. 11 I. A. 218.

^{(4) (1873) 10} Bom. H. C. 491,

^{(2) (1885) 9} Bom. 324.

^{(5) (1867) 4} Bom. H. C. 31.

^{· (3) (1896) 19} All. 267 s.c. L. R. 24 I. A. I. (6) (1884) 11 Cal. at p. 132.

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in Girdhar Parjaram v. Daji Dulabhram (1) as to what was the essential ground of decision in that case. The judgment in Kalidas Mullick v. Kanhay Lal (2) further distinguishes between cases of contracts on the face of them purporting to be for performance in future, as in the cases of Rajah Saheb Perhlad Sein v. Baboo Budhoo Singh (3) and Rani Bhobosoondri v. Issurchunder Dutt (4) on the one hand, and cases where under the terms of a gift the donor is entitled to possession on the other, and with reference to the last-mentioned cases observed that there is no reason why a gift or contract of sale, if it is not of a nature which makes the giving effect to it contrary to public policy, should not operate to give the donee or purchaser a right to obtain possession.

The contention having been raised that the completion of a gift by possession was required on the analogy of the feudal rule as to investiture and livery of seizin, their Lordships preferred the analogy found in cases relating to voluntary contracts or transfers, where if the donor has done all that he could do to perfect his contemplated gift, he cannot be compelled to do more. With this may be compared the rulings in Standing v. Bowring (5) and cognate cases.

As to the contention that the deed of gift was utterly invalid because the donor was out of possession and no possession was ever given to the donee, it was observed "that the dispute was not between the donee and the donor, or a person claiming under her" (I. L. R. 11 Cal. 132). Thus the effect of the decision in Kalidas Mullick's case is to recognize that, as between a donee and a stranger, a gift may be valid though at the time the donor may have been out of possession and though the donee may never have obtained possession, provided that the donor had done all the donor could to complete the gift.

The other Privy Council case of Nawab Ibrahim v. Ummatul Zohra (6) seems to establish the converse, viz., that when the alleged donor has not done all he could to complete the gift, but

^{(1) (1870) 7} Bom. H. C. 4.

^{(2) (1884) 11} Cal. 121 s.c. L. R. 11

I. A. 218.

^{(3) (1869) 12} M. I. A. 275 at p. 306.

^{(4) (1872) 11} Ben. L. R. 36.

^{() (}LOID) II DOM, M. IN OU

^{(5) (1886) 31} Ch. D. 282.

Joitaram v. Ramkrishna. has made a reservation of the jus disponendi, the alleged gift is unsustainable. The essential to the validity of a gift seems to be, therefore, that the donor should have done all he could to complete the gift.

It may be noted that the case of Vasudeo Bhat v. Narayan Daji Damle (1) was decided two years before that of Kalidas Mullick, (2) and so far as it is inconsistent therewith, is overruled thereby.

The case of *Ugarchand* v. *Madapa*,⁽³⁾ decided shortly after *Kalidas Mullick's case*, applied its principles to a *kararnama*, where the person who executed it was not in possession, and declared the Full Bench decision in *Bai Suraj* v. *Dalpatram Dayashanker*⁽⁴⁾ overruled.

The Allahabad High Court, in Man Bhari v. Naunidhi(5) followed in Balmakund v. Bhagwandas, (6) seems to have held that the validity of the gift was dependent on, or at least established by, the delivery of the deed of gift. But the first of these was decided before Kalidas Mullick's case, and the second does not refer to it. In Man Bhari v. Naunidhi, the fact that the donor had relinquished the subject of the gift, so far as he could, was apparently regarded as the most important circumstance in the case. The case Lakshimoni Dasi v. Nittyananda Day (7) was one in which the alleged donor had executed a duly registered deed of gift, but four years after sold a portion for consideration and later another portion. The Calcutta High Court in that case, citing the decision in Dharmodas Das v. Nistarni Dasi(S) as correct in cases to which section 123 of the Transfer of Property Act applies, appears to have held that acceptance on the part of the donee was essential to the validity of a gift. The judgment in Lakshimoni Dasi's case make's, however, but the most cursory reference to Kalidas Mullick's case, which, it may be noted, nowhere refers to acceptance by the donee as essential. But as in Lakshimoni Dasi's case the alleged donor had never given

^{(1) (1882) 7} Bom. 131.

^{(2 (1884) 11} Cal. 121 s.c. L. R.

¹¹ I. A. 218.

^{(3) (1885) 9} Bom . 324.

^{(4) (1880) 6} Bom, 380.

^{(5) (1881) 4} All. 40.

^{(0) (1894) 16} All, 185.

^{(7) (1892) 20} Cal. 469.

^{(8) (1887) 14} Cal. 446.

possession and the alleged donee had never made any objection to the subsequent vendor's possession, it is possible to regard that case as not inconsistent with the principle in Nawab Ibrahim Ali Khan . Umamatul Zohra,(1) and as regarding the alleged gift as incomplete, on the ground that though a document was executed, the alleged donor never intended to give effect to it and did not do all he might in order to give effect to it, and that the alleged donee having apparently acquiesced in his subsequent dealings with the property, it was fully understood that the mere execution of the document was not all that the donor would have done if he had wanted to perfect his gift. In Meherali v. Tajudin (2) the decision of the Privy Council in Kalidas Mullick v. Kanhya Lal(3) was referred to, but deemed inapplicable to a case governed by Mahomedan law and this Court's ruling in Mohinudin v. Manchershah (4) was therefore followed, though in the same year the Privy Council case, Mahomed Buksh Khan v. Hosseini Bibi, (5) applied the principle of Kalidas Mullick's case to Mahomedan law.

The following cases may be noted as instances in which the ruling in Kalidas Mullick has been followed: Lallubhai v. Keso⁽⁶⁾; Shankar v. Visaji⁽⁷⁾; Ramchandra v. Mhasu⁽⁸⁾; and in one of them, Lallubhai v. Keso, registration was regarded as capable of supplying want of possession. In Rajaram v. Ganesh(0) it seems to have been regarded as a matter so far beyond dispute as to dispense with the need for citing authorities, that where a donor takes all the steps in his power to give effect to it, a gift is complete and he cannot revoke it. And in Mayne's Hindu Law(10) it is stated that when the resistance to the donor's attempts to give full effect to the donation arises from a third person, the fact that possession has not been given is no answer to a suit by the donee against the obstructing party. And though it is further stated by Mayne (11) that there must be a transfer of the apparent evidences of ownership from the donor to the donce, it is also stated to be sufficient if the change of

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^{(1) (1896) 19} All. 267.

^{(2) (1888) 13} Bon. 156.

^{(3) (1884) 11} Cal. 121 s.c. L. R.

¹¹ I. A. 218.

^{(4) (1882) 6} Bom. 650.

^{(5) (1888)} L.R. 15 I.A. 81. s.c. 15 Cal. 684.

^{(6) (1886)} P. J. p. 33.

^{(7) (1884)} P. J. p. 35.

^{(8) (1888)} P. J. p. 14.

^{(9) (1898) 23} Bom. 131.

^{(10) 6}th Edn., p. 485, sec. 377.

⁽¹¹⁾ Hindu Law, p. 485, sec. 378.

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possession is such as the nature of the case admits of, and as instances are cited the delivery to the done of the deed of gift, the possession of the donor in trust for a done incapable of taking possession as being a minor, &c.

In the present case the donors never appear to have assumed actual personal possession after the death of their mother for whose benefit the land had been kept joint, and the lower Appellate Court appears to have held that actual possession remained throughout with the father of the plaintiff. There was, therefore, no apparent reservation of any kind on the part of the donors. In relinquishing their own claims they did all that was practically necessary and by their registered deed of gift all that they could. It is objected that the mother of the donee was mentioned in that document as his guardian, but it is hardly to be conceived that the father of the donee could be regarded as setting up a possession adverse to his infant son or that the donors in assenting to his continuance in possession understood it to be adverse either to themselves or to the child. The possession of the father having manifestly originated in a mutual understanding, which recognized the title of the owners, could not without some overt act become adverse to them or to their disposing power: Dadoba v. Krishna (1); and the possession of the father was practically the only mode in which the infant son could accept or exercise possession. The donors never objected and made no attempt to revoke their gift. No division was necessary, as the entirety of the land in question was with the plaintiff's father.

It has been suggested by the lower Appellate Court that the gift was invalid as being the gift of an undivided share, and Vrandavandas Ramdas v. Yamunabai (2) was cited as authority. But that was a case of alienation by a member of an undivided family to an outsider, whereas in the present case the gift is by persons who were not members of an undivided family (the uncles of the plaintiff having previously separated from his father) to the plaintiff, a member of another coparcenary. No consent was necessary to validate the alienation, nor was there

any one who did or could object. The parties being Hindus, the question that arose in Sheikh Muhummad Mumtaz Ahmad v. Zubaida Jan (1) cannot arise here. On these grounds the gift appears unimpeachable.

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Then it seems to have been held that the plaintiff is estopped from denying his father's title, because he allowed the mortgagee in 1887 to believe that his father was the sole owner and to advance money in that belief. Now, as the plaintiff admittedly only attained his majority in 1892, he was but a lad of thirteen in 1887 and cannot be reasonably regarded as having stood by and looked on in such manner as to estop him from questioning the transaction now. The property never passed from the possession of the father as on behalf of his son till the date of Exhibit 18—1st January, 1887. And this suit, instituted on 3rd January, 1899, allowance being made for the Christmas holidays, was therefore within time. The suit therefore does not appear to be time-barred. It is true that it seems somewhat of a hardship that defendant having advanced money to the father should be deprived by the son on the point of acquiring a statutory title. But the son has not been shown to have been to blame and is not liable to lose his title for his father's acts. What other liabilities there may arise out of the transaction it is not necessary to discuss here. The plaintiff's pleader states that he has nothing to urge against an equitable order that the son should recover subject to payment of the proportionate amount of the loan by which he and his father have benefited.

As to the last point, viz., that the auction-purchaser was a necessary party, it seems sufficient to observe that the plaintiff must be left to exercise his own discretion as to joinder of a defendant whose title is not necessarily involved in that of any other party to the suit. The plaintiff is dominus litis: Rajaram Bhagwat v. Jibai. (2) If he chooses to leave the question that may arise between himself and the auction-purchaser to future settlement, he does so at his own risk. He is not bound to sue every possible adverse claimant in this suit, if none of the parties claim through the auction-purchaser, and for the purposes of this suit it is not necessary to establish title against him.

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Much has been said as to the effect of Exhibits 51, 52 and 53 in this case, as judgments not inter partes and therefore inadmissible. This, under recent decisions, seems hardly to be a sustainable contention. But the judgments in question seem to add little to what appears from the record in this case, except that they contain a finding of fact that the mortgagee (defendant 2) in this case had actual notice of the deed of gift. unnecessary to have recourse to this, however, even for this purpose, for the defendant No. 2 does not appear to have raised the contention that he was a purchaser without notice, nor does it appear that such a contention, if defendant 2 had set it up, could have prevailed. The defendant 2 preferred to impugn the plaintiff's title on the ground of an alleged defect, which if established would at most have shown that the donors were entitled, and though it is contended that in such case their title would have been time-barred, it would have been difficult to conceive how the possession of defendant 1 could have been adverse to them at a date earlier than that at which it could have become adverse to the plaintiff. So far as they could they completed the gift, the terms of which they embodied in the registered deed, and they have never attempted any reservation or revocation in their own favour, and a stranger cannot challenge its validity as against the donee.

The decree of the lower Appellate Court must be reversed; the appellant appears, however, to be entitled only to the share of his uncles in the entire field, and the decree must, therefore, be limited to one awarding him one-fourth share of the field to be ascertained in execution. Possession to be given to plaintiff on his paying into Court within six months from this date one-fourth of the amount due on Exhibit 18. The defendant 1 to bear his own costs and defendant 2 to pay plaintiff's costs and bear his own throughout.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Batty and Mr. Justice Aston.

TARUBAI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v. VENKATRAO AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1902. September 12.

Adverse possession—Mortgage—Redemption—Adverse possession as against mortgagor—Possession obtained under an agreement with mortgagee—Notice to mortgagor of such possession—Limitation Act (XV of 1877), schedule II, article 144.

The plaintiff filed this suit to redeem a mortgage with possession of certain land dated 18th October, 1866. The plaintiffs were the daughters and grandson of the mortgagor Khutubsha (the widow of one Kondi Aga). The first defendant was the grandson and heir of the mortgagee (Nageshrao). The second and third defendants were nephews of Kondi Aga. They denied that the plaintiff being female had any right to the property, and they alleged that they themselves had been in possession since 1885 under an agreement with Nageshrao, the original mortgagee, and they contended that the plaintiff's claim was therefore now barred by limitation. It appeared that in 1885 defendants 2 and 3 had claimed to be the heirs of Kondi Aga, the husband of the mortgagor, and had entered upon the land. The mortgagee thereupon filed a suit against them under section 39 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), which, however, was settled by an agreement before the conciliator on the 31st August, 1885, whereby defendants 2 and 3 undertook to pay off the mortgage and it was agreed that they should remain in possession of the land. This agreement was filed as a decree on the 27th November, 1885, under section 44 of the Act. The last instalment of the mortgage-debt was paid to the first defendant by defendants 2 and 3 in September, 1897. The plaintiffs had no notice or knowledge of any of the abovementioned proceedings. On the 5th October, 1897, the plaintiffs filed this suit to redeem the mortgage of 1866 and to recover possession of the lands. The lower Courts held that the plaintiffs were the heirs, but that the suit was barred by limitation under article 144 of schedule II of the Limitation Act (XV of 1877), inasmuch as defendants 2 and 3 had been in adverse possession for more than twelve years. On appeal to the High Court,

Held, (reversing the decree of the lower Court and remanding the case) that the suit was not barred. The possession of the defendants was not adverse to the plaintiffs, inasmuch as there was no notice or knowledge, or circumstance that could have given notice or knowledge, to the plaintiffs (mortgagors) that the defendants' possession was in displacement of their rights. They had no reason to know that their rights were invaded, and until they had such reason there could be no necessity for them to take action.

^{*} Second Appeal No. 53 of 1901.

Tarubai v. Venkatrao. SECOND appeal from the decision of R. Knight, District Judge of Sátára, confirming the decree passed by Ráo Sáheb N. V. Samant, Subordinate Judge of Khatáv.

Suit for redemption. On 18th October, 1866, the widow of one Kondi Aga mortgaged the land in suit to one Nageshrao with possession.

Plaintiffs 1 and 2 were the daughters of the mortgagor and Kondi Aga and plaintiff 3 was a grandson (a son of a deceased daughter) and they now sued to redeem the mortgage. This suit was filed on the 5th October, 1897.

Defendant 1 was the grandson and heir of the mortgagee (Nageshrao). Defendants 2 and 3 were nephews of Kondi Aga. They denied the plaintiffs' right to the property, alleging that being females they (the plaintiffs) could not succeed to it as it was Fakiri Vatan. They also alleged that they (defendants 2 and 3) had been in possession since 1885 under an agreement with Nageshrao, the mortgagee, and they contended that the claim of the plaintiffs was now barred by limitation.

It appeared that prior to 1885 defendants 2 and 3, claiming to be the heirs of Kondi Aga, entered and took possession of the land. Nageshrao, the mortgagee, thereupon filed a suit under the provisions of section 39 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to recover the money due on his mortgage. On 31st August, 1885, however, the parties arrived at an agreement before a conciliator, whereby defendants 2 and 3 undertook to pay off the mortgage by instalments, and they were to remain in possession of the land. This agreement was filed as a decree on the 27th November, 1885, under section 44 of the Act. The last instalment of the mortgage-debt was

⁽¹⁾ Sections 39, 43 and 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) run as follows:

^{39.} When any dispute arises as to, or there is prospect of litigation regarding, any matter within the cognizance of a Civil Court between two or more parties, one of whom is an agriculturist residing within any local area for which a conciliator has been appointed, or when application for execution of any decree in any suit to which any such agriculturist is a party, and which was passed before the date on which this Act comes into force, is contemplated, any of the parties may apply to such conciliator to effect an amicable settlement between them.

^{43.} If on the day on which the case is first heard by the conciliator, or on

paid to the first defendant by defendants 2 and 3 in September, 1897.

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The plaintiffs had no notice or knowledge of any of these proceedings.

The Court of first instance rejected the plaintiffs' claim for redemption and dismissed this suit. It found that the mortgage was proved and that the plaintiffs were entitled to succeed to the property as heirs of the mortgagor, but it held that this suit not having been filed until the 5th October, 1897, their claim was time-barred, inasmuch as the defendants 2 and 3 had been in adverse possession of the property since August, 1885, the date of the abovementioned agreement before the conciliator. In its judgment the Court said:

The defendants 2 and 3 urge that the plaintiffs' claim is time-barred as they have been holding the lands adversely to the plaintiffs for over twelve years previous to the suit. It is contended for the plaintiffs that article 148 of the Limitation Act applies to the case, and not article 144, and that even if it did, the defendants' possession has not been adverse to them. The defendants 2 and 3 have been in possession as strangers, and thus, I think, article 144 of the Limitation Act applies. According to that article, the defendants must show that they have been holding the property adversely to the plaintiffs for over twelve years previous to the institution of the suit. The plaintiffs' pleader relies on the case of Chinto v. Janki(1) as an authority to show that an

any subsequent day to which he may adjourn the hearing, the parties come to any agreement, either finally disposing of the matter or for referring it to arbitration, such agreement shall be forthwith reduced to writing, and shall be read and explained to the parties, and shall be signed or otherwise authenticated by the conciliator and the parties respectively.

44. When the agreement is one finally disposing of the matter, the conciliator shall forward the same in original to the Court of the Subordinate Judge of lowest grade having jurisdiction in the place where the agriculturist who is a party thereto resides;

and shall at the same time deliver to each of the parties a written notice to show cause before such Judge, within one month from the date of such delivery, why such agreement ought not to be filed in such Court.

The Court which receives the agreement shall, after the expiry of the said period of one month, unless cause has been shown as aforesaid, order such agreement to be filed; and it shall then take effect as if it were a decree of the said Court passed on the day on which it is ordered to be filed and from which no appeal lies.

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adverse possession to the mortgagee is not necessarily so to the interest of the mortgagor, while the defendants' pleader relies on Puttappa v. Timmaji.(1) It appears from the cases cited that there may be an adverse possession even to the mortgagor and those claiming under him, but it is for the defendants to prove it. The question therefore is, when did the possession of defendants 2 and 3 become adverse to the plaintiffs? The case of Cholmondeley v. Clinton(2) relied on in the case of Puttappa v. Timmaji shows that when a person claiming to be entitled to the equity of redemption enters on the mortgaged property and pays the interest on the mortgage, his possession is adverse to the true owner. In this case the defendants 2 and 3 were in possession already. They retained the possession as being entitled to the equity of redemption and passed a kabulayat before the conciliator to pay the mortgage debt in that capacity and did pay money accordingly. In the case of Chinto v. Janki it was laid down, "mere ouster unaccompanied by any further act of aggression on the mortgagor's rights cannot give any cause of action to the latter." But in the present case, the defendants 2 and 3 not only retained possession as being entitled to the equity of redemption as heirs of Khutubshabi, but passed a kabulayat agreement to pay the mortgage debt as such heirs and have made payments accordingly. The defendant 1 admits that he has received payments from the defendants 2 and 3 according to the kabulayat. The kabulayat shows that on the day it was passed the defendants 2 and 3 asserted that they were entitled to the equity of redemption. It appears to me on that day they assumed an attitude of being the owners of the lands as heirs, and by entering into a kabulayat agreement as if they were the owners, I consider they did aggress upon the mortgagor's rights. I think, therefore, that since 31st August, 1885, the possession of defendants 2 and 3 has been adverse to the plaintiffs. The plaintiffs filed their suit on 27th November, 1897. They applied to the conciliator for a certificate on 5th October, 1897, and got it on 27th November, 1897 (vide Exhibit 3). Excluding the said period, the plaintiffs are found to have instituted their suit more than twelve years after the possession of defendants 2 and 3 became alverse to them. I, therefore, find the fifth issue in the affirmative.

On appeal the District Judge confirmed the decree. In his judgment he said:

In my opinion defendants have held adverse possession, at least since the date of the agreement. The property really in suit between themselves and the plaintiffs is not the land itself, but the equity of redemption; and it is clear that defendants have claimed to hold this as owners and to the exclusion of plaintiffs since that date. Article 144 supplies the limitation applicable, viz., twelve years from the time when the possession of the defendant becomes adverse

to that of the plaintiff, and it is plain that in this case that time must be deemed to be 21st August, 1885. I do not think that the recognition of the agreement by the Court has any effect upon the question.

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It is argued (1) that possession cannot be adverse unless the rightful owner is aware that he is excluded, and (2) that the possession of defendants was really that of tenants of the mortgagor, through whom plaintiffs were enjoying constructive possession, at all events until the loan was repaid. As for (1), it is true that in the present case plaintiffs had no notice that defendants had usurped the equity of redemption; but I can find no authority for the proposition that knowledge on the part of the person whose rights are invaded is an essential element of adverse possession. Neither Wharton's nor Starling's definition of the term includes any such ingredient; and it is clear that if article 144 were intended to mean twelve years from the date on which "plaintiff becomes aware" of the adverse possession, there is no reason why the Legislature should not have used those words, as in so many other articles in the schedule. As for (2), the argument is specious, but unsound. The rulings quoted in its support (I. L. R. 18 Bom. 51 and 12 Bom. H. C. R. page 180) impugn rather than support it. The second is hardly relevant to this case, and the first, while recognizing that possession by parties other than the mortgagee is not necessarily adverse to the mortgagor's rights, avowedly contemplates the possibility of eases of an opposite character. The argument is really based upon a confusion that I have already endeavoured to avoid. It is not the possession of the land that is adverse, but that of the equity of redemption. If some person other than the true owner claims to hold this right as owner himself, his possession is obviously adverse. Apart from this, it cannot fairly be said that the defendants were on the land as tenants of the mortgagee, although it is true that the agreement gives the latter the right of re-entry upon the land in the event of default in the payment of the instalments. I think that they were on the land as owners subject to a certain liability to the mortgagee, for whom a certain remedy was provided if they failed to discharge the liability.

The plaintiffs preferred a second appeal to the High Court, contending that the lower Courts erred in holding that the claim was barred by limitation, and that the possession of defendants 2 and 3 was adverse to the plaintiffs from the date of the agreement of 31st August, 1885; they contended that the defendants 2 and 3 could at most only claim contribution from the plaintiffs.

Narayan M. Samarth for the appellants (plaintiffs):—The possession of defendants 2 and 3 was not adverse to the plaintiffs and therefore the suit is not barred by limitation. The lower Appellate Court has found that the plaintiffs had no

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notice or knowledge of the agreement of the 31st August, 1885, between the first defendant as mortgagee and defendants 2 and 3. The fact that as a result of a dispute between them the first defendant agreed to give possession to defendants 2 and 3 cannot affect the plaintiffs, who know nothing of the matter and were not parties to that agreement. Their rights as mortgagors remained Possession secretly obtained cannot in law be untouched. adverse: article 144 of the Limitation Act (XV of 1877) does not make time run from the date of the defendants' wrongful possession, but from the date at which the defendants' possession becomes adverse to the plaintiff. We submit it cannot become adverse unless it comes to the plaintiff's knowledge: Bejoy Chunder v. Kally Prosonno (1); Puttappa v. Timmaji. (2) Cholmondeley v. Clinton(3) cited by the lower Court deals with acquiescence, but acquiescence implies knowledge: Vithoba v. Gangaram(1); Ammu v. Ramakrishna (5); Chinto v. Janki (6); Moidin Oothumanganni (7); Vasudev v. Balaji. (8) In any event, the date of the decree in terms of the agreement, viz., 27th November, 1885, is the date which should be taken as the starting point of the period of limitation; and in that case the present suit is in time. Again, the possession of defendants 2 and 3 cannot be said to be adverse to the mortgagor or his representative so long as the mortgage was subsisting. By the agreement defendants 2 and 3 undertook to pay defendant 1 the mortgage-debt by instalments. The last instalment was not paid off until September, 1897, so the mortgage was in existence until then.

B. A. Bhagwat for respondents (defendants):—The finding of the lower Court that defendants 2 and 3 have been in adverse possession for more than twelve years is a finding of fact, that cannot be questioned in second appeal. That finding is correct. An adverse possession is possession inconsistent with the title of the rightful owner, and it is immaterial whether the rightful

^{(1) (1878) 4} Cal. 327.

^{(2) (1889) 14} Bom. 176.

^{(3) (1820) 2} Jac. and W. 1.

^{(4) (1875) 12} Bom, H. C. R. 180.

^{(5) (1879) 2} Mad. 226.

^{(6) (1892) 18} Bom. 51.

^{(7) (1888) 11} Mad. 416.

⁽S) (1902) 26 Bom. 500.

owner has notice of such possession or not. His knowledge does not affect the character of the possession. It is nowhere laid down that notice to the rightful owner is required: see Bhavrao v. Rakhmin (1); Puttapa v. Timmaji (2); Ammu v. Ramakrishna. (3)

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Battry, J.:—In this case the plaintiffs sued to redeem certain property by payment of such amount as on account taken might be found due from them, in respect of a mortgage executed by the widow of one Kondi Aga (the father of two of the plaintiffs and grandfather of the third) to the deceased grandfather of defendant No. 1, with possession, for Rs. 170, about thirty years before suit. The plaintiffs allege that the mortgage had been satisfied by the produce received, but defendant 1 has, on demand, refused to render an account on 1st March, 1897. The other defendants were joined (the plaint stated), as they had been in enjoyment on behalf of defendant 1.

The first defendant admitted that the land had been mortgaged with possession, but alleged that the defendants 2 and 3 had been in possession since 1885 by virtue of an agreement entered into by them with the grandfather of the first defendant. Of the other defendants, Nos. 2 and 3 denied the rights of the plaintiffs, alleging that the plaintiffs being females could not succeed to the property which is Fakiri Vatan, and as such, defendants alleged, incapable of being managed by females. The defendants also alleged that they had enjoyed possession throughout and that the claim of the plaintiffs was time-barred.

The Court of first instance found the mortgages alleged proved and held that the plaintiffs were not disentitled by family usage, but were entitled to succeed as heirs of the mortgagor. It held, however, that their claim was time-barred by reason of the fact that the defendants had been in possession as entitled to the equity of redemption and had on 31st August, 1885, by a kabulayat passed before a conciliator, undertaken to pay the amount of the mortgage, and had paid money accordingly, and that the defendants having assumed an adverse attitude from 31st August, 1885, the plaintiffs' suit, not having been filed until

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The lower Appellate Court took the same view, holding the possession of the defendants to have been adverse from the date on which they arrived at an agreement with the conciliator in 1885 to pay off the mortgage by annual instalments of Rs. 8, whereby they extinguished their lien in 1897. Appellate Court held that in the present case plaintiffs had no notice that the defendants had usurped the equity of redemption, but that there was no authority for the proposition that knowledge on the part of the person whose rights are invaded would be essential to adverse possession, that there had been adverse possession of the equity of redemption as well as possession of the land and that therefore the case of Chinto v. Janki (1) was inapplicable, and that though the agreement gave the mortgagee a right of re-entry on default in payment of instalments, yet the position of the defendants 2 and 3 under that agreement was that of owners subject to a liability, and not that of tenants.

The view of the lower Appellate Court and of the Court of first instance, that article 144 of schedule II of the Indian Limitation Act, 1877, "supplied the limitation applicable," is not contested on appeal. The only question, therefore, that arises in this appeal is whether the possession of the defendants 2 and 3 became adverse to the plaintiffs at the date of the agreement and by reason of the agreement which was entered into by those defendants with the mortgagee, and of which the plaintiffs, according to the finding of the lower Appellate Court, had no notice.

The grounds on which the lower Appellate Court held the possession of the defendants adverse, appear to be that there is no authority for holding that "knowledge on the part of the person whose rights are invaded is an essential element of adverse possession"; that article 144 does not make time run from the time when the plaintiff becomes aware of the interference with his rights; that the ruling in Chinto v. Janki "avowedly

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contemplates the possibility of cases" in which possession by parties other than the mortgagee may be adverse to the rights of the mortgagor; and that the possession of the defendants in this case which was adverse was not possession of the land itself, but the possession of the equity of redemption. The lower Appellate Court considered that the arguments advanced to show that the possession of the defendants was not adverse were based on a confusion of the notion of possession of the land with the notion of possession of the equity of redemption. The passage which follows this remark in the judgment runs: "If some person other than the true owner claims to hold this right as owner himself, his possession is obviously adverse."

From the passages above referred to, it would seem that what the lower Appellate Court regarded as the possession of the right 'was the claim to hold the right." But possession means something more than a mere claim to hold. And the possession of a right, juris quasi possessio, if that much questioned phrase be permissible at all (1) and if it means anything at all. consists in the exercise of a right, jus in re.(2) And unless and until there be an exercise of rights in excess of that which is involved in the possession of the land itself, if the possession of the land be not adverse, there can be no possession that is adverse. The definition of adverse possession by Markby, J., to which the District Judge refers as Mr. Justice Starling's, is to be found in Bejoy Chunder v. Kally Prosonno. (3) It was accepted by the Full Bench decision of this Court in Bhavrao v. Rakhmin (4) and runs as follows:- "By adverse possession I understand to be meant possession by a person holding the land, on his own behalf, of some person other than the true owner, the true owner having the right to immediate possession." The last five words of this passage are essential. For if the true owner has no right to immediate possession, it is practically immaterial to him who is in possession. Having no right himself to possession he cannot eject the person in possession: contra

⁽¹⁾ See Savigny on Possession, Book I, ss. ix and xii.
(2) Savigny, Book I, xii; Sir E. Perry's Translation, p. 131.
(3) (1878) 4 Cal. 329.
(4) (1898) 23 Bom. 137 p. 141.

Tarubai v. Venkatrao. non valentem agere non currit præscriptio. A claim, not divulged or communicated or manifested by overt acts affecting existing rights, gives no apparent cause of action, and no article of the Limitation Act appears to apply before a right to sue accrues.

The adverse possession of a right then, as seems indeed to be indicated or implied by articles 124, 125, 126, 129, 131 and other provisions of the schedule, must consist of some exercise of that right. And if the exercise of the right consists solely in the possession of land, then the possession of the right cannot be adverse unless the possession of the land be adverse. Under the Roman Law, "possession was not lost in land until the possessor had notice of his physical power to deal with it having been destroyed." (1) This doctrine was of special importance in connection with the peculiarity of Roman Law, which denied possession to the tenant and to the fructuary.(2) When the possessor is himself prevented from dealing with the land, i.e., when there is dejectio, there can be no doubt about his knowledge of its loss. But actual knowledge is not necessarily in all cases material if there be the means of such knowledge: Womesh Chunder Goopto v. Raj Narain Roy (3) and Bejoy Chunder Banerjee v. Kally Prosonno Mookerjee. (4) As stated by Mitra, (5) "actual knowledge is not necessary. Knowledge may be presumed from an open and notorious act of taking possession: see Angell on Limitation, 292." But although there may be adverse possession notwithstanding the fact that the owner discontinuing possession is unaware of the possession taken by another, yet the possession must have been used openly and, "without any effort made or step taken to produce concealment": Rains v. Buxton. (6) There must be an adverse act-Searly v. Tettenhum Railway Co. (7) -and nothing that would lead the owner to suppose that his rights remain intact: Adnam v. Earl of

⁽¹⁾ Savigny on Possession Book III, s. xxxv; Sir E. Perry's Translation, pp. 151, 227, 261, 262, 266, 268, 275, 277, 281.

⁽²⁾ Savigny, Book II, xxv, p. 206, note (d), and pp. 207, 209.

^{(3) (1868) 10} Cal. W. R. 15, pp. 16 & 17.

^{(4) (1878) 4} Cal. 327.

⁽⁵⁾ Tagore Law Lectures, Law of Limitation and Prescription, p. 135, note (6).

^{(6) (1880) 14} Ch. D. 523 pp. 540, 541.

^{(7) (1868)} L. R. 5 Eq. 4(9 p. 412.

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Sandwick.(1) The possession taken must not be clandestine. For possession, in order to ripen into a prescriptive title, must be juridical and have none of the vitia possessionis as clam vi aut precario. And if in its inception it is vitiated by its clandestine, violent or permissive character, it must lose that character and become open, peaceable and as of right, before it can cause time to run. And it is fully established that when there is no act of taking possession, something more than a mere adverse claim is necessary to make possession adverse. Thus "one who holds possession on behalf of another does not, by a mere denial of that other's title, make his possession adverse, so as to give himself the benefit of the Statute of Limitations": Bejoy Chunder Banerjee v. Kally Prosonno.(2) There must be some "adverse act," so that if the possession has commenced and continued in accordance with "any contract, express or implied, between the parties in and out of possession, to which the possession may be referred as legal and proper, it cannot be presumed adverse.....So also in cases between mortgagor and mortgagee": Dadoba v. Krishna.(3) That is to say, if there be no adverse act, nothing overt and no unmistakeable ouster, or taking of possession, and all that is done is referable to, or consistent with and susceptible of explanation by, some title which does not impugn but recognise the right of the person seeking to recover possession, then there can be no possession adverse to that person without notice or intimation to him of some kind, that an adverse claim has been set up in opposition to his right theretofore recognised: Ittappan v. Manavikrama. (4) "The party claiming to hold adversely must at least go on to prove that it was in denial of the other's title that he excluded him from enjoyment of the property. According to the English cases there must be something amounting to ouster of the person against whom adverse possession is claimed." The case of Ramchandra Yeshwant v. Sadashiv Abaji(5) is to similar effect: "As long as possession can be referred to a right consistent with the subsistence of ownership in being at its commencement, so long

^{(1) (1877) 2} Q. B. D. 485 v. p. 490.

^{(3) (1879) 7} Bom. 34 v. p. 39.

^{(2) (1878) 4} Cal. p. 329.

^{(4) (1897) 21} Mad. 153 v. p. 159.

^{(5) (1880) 11} Bem. 423.

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must the possession be referred to that right, rather than to a right which contradicts the ownership." And as shown by the cases of Womesh Chunder Goopto v. Raj Narain Roy (1) and Bejoy Chunder Banerjee v. Kally Prosonno Mookerjee (2) and in Sharat Sundari v. Bhobo Pershad, (3) Vinayak Janardan v. Mainai, (4) and Krishna Gobind v. Hari Churn, (5) even where there is an act of taking possession, the possession will not be adverse as against any person who is not for the time being entitled to possession and who is therefore neither interested in, nor capable of, ejecting the person who has taken possession. There must be some adverse act sufficient to give the person to be affected by it an opportunity of knowing that his rights are being infringed and that occasion has arisen for action by him to protect them: Dewan Manwar Ali v. Unnoda Pershad Roy (6); Mussummat Bebea Sahodra v. Roy Jung Bahadur. (7) Thus, a tenant or lessee does not, merely by ceasing to continue possession on behalf of the owner, necessarily create a possession adverse to the latter.

On the other hand, "if the case be of such a nature that the possession would be lost even if no agent had interfered with it, in such case it would be always lost." If the act of a wrong-doer dispossess the agent, undoubtedly the possession is lost, and the knowledge of the prior possessor is immaterial." (a) This applied equally when the tenant was dispossessed: "Quod servus vel procurator vel colonus tenent, dominus videtur possidere et ideo his dejectis ipse dejici de possessione videtur ctiam si ignoret cos dejectos per quos possidebat."

Thus the agent, tenant or other person holding on behalf of the owner, is a means of securing and continuing his possession (i.e., the power of dealing at will with the subject-matter) and may for convenience of illustration be regarded in the same light as any other agency or arrangement such as a safe or other receptacle performing the same protective functions. As long as the subject-matter is so protected and the means of protection is still within the control of the owner, it is obvious that his

^{(1) (1869) 10} Cal. W. R. 15.

^{(2) (1878) 4} Cal. 327.

^{(3) (1886) 13} Cal. 101.

^{(4) (1894) 19} Bom, 138.

^{(5) (1882) 9} Cal. 367.

^{(6) (1879)} L. R. 7 L. A. 1.

^{(7) (1881)} L. R. S I. A. 210.

⁽⁸⁾ Savigny, Book III, s. 35; Sir E. Perry, 277-278.

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power of dealing with the subject-matter can no more be lost by the mere addition of any subordinate possessor, than a document would be lost merely by its being placed in an enclosure within the owner's safe. The owner would still have the power of reproducing at will his enjoyment of the subject-matter, unless and until on his having occasion to make use of it he found that he was resisted by the protecting agency itself. The same might occur with property in a safe which it was found necessary to force open to get at the property. And if a stranger removed the subject-matter from the safe or other means of protection, but made no attempt to remove it from the owner's possession and control, the owner would not lose his power of using it and would be under no necessity of taking steps to recover possession until the subject-matter was taken, not merely out of the safe. but entirely out of his own possession and control, in which latter case his loss would be as complete and unmistakeable as if no means of protection had ever been employed. In the same way, the person intended to secure and continue possession may lose it without the possession of the owner being necessarily affected. But if the property is removed not only from the control of such person but also from the control of the owner, the possession is much lost in that case, and the necessity for action by the owner arises as immediately, as if there had never been any protecting agency at all. This very obvious distinction between a loss affecting only the agent or means of protection, and a loss affecting also the owner, seems to lie at the root of those cases in which it has been held that while there may be possession adverse to the mortgagee, which is not adverse to the interest of the mortgagor, yet it does not follow that so long as the mortgagor is entitled only to the equity of redemption, there can be no invasion of his interest.

The cases of *Chinto* v. *Janki*⁽⁾ and *Vithoba* v. *Gangaram*⁽²⁾ suggest instances in which the mortgagor's interest is not assailed.

The case of Ammu v. Ramakrishna Sastri⁽³⁾ is an instance and cites instances in which the interest of the mortgagor is assailed.

^{(1) (1892) 18} Bom. 51. (2) (1875) 12 Bom. H. C. 180. (3) (1879) 2 Mad. 226,

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The essential difference in the circumstances of the two sets of cases is that in the first set of cases the mortgagors had no apparent reason to suppose that their rights must have been infringed, while in the second set the mortgagors must necessarily have known that they as well as the mortgagees had been deprived of the power of exercising their rights and that some one else was exercising them. In the cases Chinto v. Janki(1) and Vithoba v. Gangaram, (which represent the first set of cases, the mortgagees while in possession were ousted by a stranger. both these cases it may be noted that the disseisor was held by the Court of first instance to have been let into possession by the mortgagee: in Vithoba v. Gangaram as tenant, in Chinto v. Janki as sub-mortgagee. The lower Appellate Court, however, in both cases held that this point was not proved. In Chinto v. Janki the plaintiff's name was entered as well as that of the original disseisor in the revenue records. It was alleged that proceedings had been taken for the removal of plaintiff's name from that record, but it was not proved that they were successful or that plaintiff had notice of them (I. L. R. 18 Bom., page 55), and there was nothing else to show in what way the possession had been adverse to the plaintiff, the mortgagor, or in other words, that there had been from the first an attempt to dispute his power of resuming possession and control on occasion arising.

In Vithoba v. Gangaram there was nothing beyond the bare ouster of the mortgagee to show that the mortgagor had any reason to suppose a possession hostile to him had commenced.

On the other hand, in the case of Ammu v. Rumukishna, which represents the second set of cases where the mortgagor's rights were held to have been assailed, the defendants had originally been let into possession as tenants. But in 1861, fifteen years before suit, an enquiry was instituted by the Deputy Collector (in which enquiry the mortgagor was represented by his mother) as to the right of the mortgagor, as against Government, to the lands in question; and in 1862 (fourteen years before suit), the Deputy Collector held the lands to be the property of Government and assessed the lands and granted them to the defendants on pattas. The plaintiff, the mortgagor, did not sue the alleged

^{(1) (1892) 18} Bom, 51. (2) (1875) 12 Bom, H. C. 180. (3) (1879) 2 Mad, 226.

trespassers till 1876. Now, in these circumstances, it is clear that the defendants did not obtain the possession under the mortgagee, or even against him alone, but by virtue of a decision in proceedings of which plaintiff, the mortgagor, had notice; so that the dispossession did not affect the mortgagee alone, but was avowedly intended to deprive the mortgagor of all control, so that his rights would have been equally infringed thereby if there had been no mortgagee in the case at all.

The judgment in Chinto v. Janki alludes to the fact that the plaintiff was not entitled to immediate possession at date of the defendant's taking possession. The judgment of Telang, J., in the same case refers specially to the definition by Markby, J., in Bejoy Chunder v. Kally Prosonno(2) as showing that possession could not be adverse to the mortgagor as long as he was not entitled to immediate possession (vide Chinto v. Janki, page 57). That is to say, if the plaintiff was not entitled to immediate possession, then the defendant's act in taking possession would not infringe any right of plaintiff's to possession and would not be adverse to plaintiff. The question, therefore, arose whether the plaintiff was entitled to immediate possession. And the answer to this question, arrived at after considering the analogous case of the effect of dispossession upon a landlord during the currency of a tenant's lease was, that the mortgagor would be entitled to claim immediate possession if the ouster of the mortgagee were such as to operate as a "virtual dispossession" of the mortgagor. This it could not be, unless it operated in some way to affect the mortgagor immediately by invading some right then necessarily exercisable by him. For, in the case of landlord and tenant, the mere ouster of the tenant was shown to be insufficient so to affect the landlord as to put him to the necessity of vindicating his position. But when the landlord was entitled to rent and the rent was not merely left unpaid (a fact which would give the real owner no unmistakeable notice of his rights being infringed), but was actually refused and paid to another person, then there would be such virtual dispossession of the rightful owner as to put him to his remedy. So in the case of the mortgagor, when his mortgagee is dispossessed, he is at liberty to say, "Whoever is in possession, it does

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not matter to me, for I am not entitled to it: the mortgagee is: and he alone is concerned, as his rights only are infringed and he is only losing his own possession, not mine, and whoever is in possession is only taking the place of the mortgagee and thus representing and continuing my possession." But he cannot continue to say this when the person who has taken possession by his acts shows, or by his open declaration avows, that he does not pretend to represent either the mortgagee or the mortgagor, but is exercising a right claimed entirely on his own account. In such a case the disseisor affects not the mortgagee's interest alone, but the mortgagor's, and the mortgagor, having no one in his place professing to hold for him, is entitled to seek recovery and is under the necessity of taking action as much as if he had been personally ousted. It was, therefore, in the case of Chinto v. Janki(1) held necessary to remand the case for a finding on the question whether the defendant had thus openly acted so as to deprive the mortgagor by assailing his rights, and if so, when the possession of the defendant had thus become adverse to the mortgagor.

The Madras High Court, in Ammu v. Ramakishna Sastri, (2) did not rely upon the ouster of the mortgagee as proof of adverse possession of the mortgagor, but upon the fact that the mortgagee's possession ceased altogether, and the mortgagor's possession was not continued constructively, but disappeared by reason of the very act of ouster which to the plaintiff's knowledge challenged his own title. Thus the adverse possession alleged against the mortgagor did not consist of a mere undivulged claim of the equity of redemption, but of an actual ouster coupled with an avowed claim, entirely independent of the mortgagee, going to the root of the plaintiff's title.

In the case of Puttappa v. Timmaji⁽³⁾ there was a similarly open taking of possession on purchase, not from the mortgagee or in recognition of any right in him, but on purchase from a person (Narsubai) who sold also in the assertion of a right not derived from the mortgagee, and the possession of the purchaser had continued from 1856 to 1884. And in that case what appears to have been regarded as the most conclusive evidence of the

(1) (1892) 18 Bom. 51. (2) (1879) 2 Mad. 226. (3) (1889) 14 Bom. 176.

adverse nature of the possession was indicated in that passage of the judgment which states that, in 1856, Narsubai was "in possession of the equity of redemption adversely to the rightful heirs and acting as if she were the owner of the property and receiving the rent which the mortgagee had agreed to pay by the mortgage-bond. Ramappa derived his title as purchaser from Narsubai, and although possession was probably given him directly by the mortgagee, it must be deemed to have been at the desire of Narsubai on his discharging the mortgage-debt." above passage shows that there was not only a bare claim of the equity, but an active exercise of the rights attaching to a holder thereof. It was not merely that Narsubai paid off the mortgage (for that is not the exercise of a right so much as the discharge of an obligation), but that she took what plaintiff, if in possession of the equity, would have been entitled to, viz., the rent agreed to by the mortgagee in the bond, a right which plaintiff must have known he was deprived of. The passage cited further shows that the possession of the purchaser Ramappa was virtually derived not from the mortgagee but from Narsubai, and the conclusion was that "the Subordinate Judge was right in considering Ramappa as deriving his possession from Narsubai and his possession as being adverse to the plaintiff from that time."

In Ittappan v. Manavikrama(1) a passage is quoted from the judgment of Telang, J., in Chinto v. Janki, (2) which stated that "the mortgager having once put the mortgage in possession ordinarily has no right to the possession until the mortgage is paid off." And it was observed, that "notwithstanding Puttappa v. Timmaji, (3) it would be seen from the later case of Vinayak Janardan v. Mainai(4) that the opinion of Telang, J., commended itself as sound to Sargent, C. J., and Candy, J. In this state of the authorities, I would say that Mr. Justice Telang's view appears to be the better view. If, however, that in Ammu v. Ramakishna Sastri(5) be the correct one, still the possession of the person taking it from the mortgagee would not be adverse unless and until the mortgagor has notice of it: Massad v. The Collector

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^{(1) (1897) 21} Mad, 153 v. p. 165.

^{(3) (1889) 14} Bom. 176.

^{(2) (1892) 18} Bom. 51.

^{(4) (1894) 19} Bom. 138.

^{(5) (1879) 2} Mad. 226.

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of Malabar. (1) " This last-mentioned case, it may be noted, is the converse of Ammu v. Ramakishna(2) as being an instance in which the mortgagor, having no notice of the proceedings of Government declaring his lands to have escheated and transferring them to another, was not affected thereby, while in Ammu v. Ramakishna the mortgagor was held to have been affected by similar proceedings because he had notice thereof. Thus notice is essential where there is otherwise no circumstance from which the plaintiff could become aware that his rights had been disputed. The case of Vasudev v. Balaji(3) appears, therefore, to have no application here. For that case was one in which a consent decree had been passed against co-owners in a mortgage suit, and one of the co-owners subsequently redeemed and having obtained and held possession for over twelve years, set up adverse possession against the heirs of the other co-owners. It was held that the possession so set up was adverse. It was argued that to hold article 148 not applicable would be to prejudice the plaintiff by an act to which he was no party. But the Court held that argument had no force in that case, inasmuch as the redemption was under a decree passed against both mortgagors. This fact gave the mortgagor who did not redeem, full notice that, if he did not redeem, either the other co-owner must have done so, or that the right was lost for ever. And the Court gave a note of warning as to the importance of this distinguishing circumstance by adding, "what considerations would apply if the redemption were without the mortgagor's knowledge, we need not now discuss." The effect of absence of such knowledge appears to have been sufficiently illustrated by the other cases hereinbefore cited, and is distinctly shown in a case more pertinent to the present question-Moidin v. Oothumanganni(4) — where one of the co-mortgagors redeemed and thereafter dealt with the land for twenty-two years from 1864 to 1886. When the sons of the co-mortgagor sued in respect of their moiety, it was held that, in the absence of proof that the land was held with an assertion of adverse title, the plaintiff was entitled to a decree. The mere assertion of title in the recital of a deed was held insufficient, and the case of Ramchandra

^{(1) (1886) 10} Mad. 198.

^{(2) (1879) 2} Mad. 226.

^{(3) (1902) 26} Bom. 500.

^{(4) (1888) 11} Mad. 416.

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Yeshvant v. Sadashiv Abaji(1) was referred to, in which the principle for computing limitation in such cases was said to be analogous to that of the provision which bars an excluded co-sharer generally by the lapse of twelve years from the time when he becomes aware of his exclusion. It is true these were cases of redemption by co-mortgagors. But the main principle involved in them is the same as that which must apply here, viz., that possession must be in some way or other ostensibly adverse before it can cause limitation to run, and when there is no actual ouster, or deprivation of any right, there must be a manifest and known assertion of a title incompatible with that of the The nature of the requisite assertion of title may be gathered from the case of Gangabai v. Kalapa, (2) where it was held that mere assertion would not avail in the case of a permanent lessee claiming to be owner, unless made to the knowledge of the owner. So also in Mulji Bhulabhai v. Manohar Ganesh,(3) "persons having come in as mere servants or agents cannot by a wish or a volition change the nature of their possession." There must be something more than an undivulged claim of right.

In the present case, the Subordinate Judge seems to regard the defendants' action as adverse because they passed a kabulayat to pay the mortgage-debt, and made payments accordingly. But this was not action which could in itself cause any loss or deprivation of plaintiff's rights apart from the claim in pursuance of which it purported to have been taken and of which the plaintiff is not found to have known anything at all. The Subordinate Judge referred, however, to the case of Cholmondeley v. Clinton, (4) as showing that when a person claiming to be entitled to the equity of redemption enters on the mortgaged property and pays the interest on the mortgage, his possession is adverse to the true owner. This statement, as to the effect of the decision in Cholmondeley v. Clinton, appears to be due to a misconception which a reference to the case itself might have corrected. The misconception is that, for the purpose of showing adverse possession of the equity, an agreement to

^{(1) (1886) 11} Bom. 422.

^{(2) (1885) 9} Bom. 419.

^{(3) (1897) 12} Bom. 322.

^{(4) (1820) 2} J. & W. at pp. 186, 187.

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redeem and payment of the money to redeem, stand on the same footing as payment of interest due from year to year by the mortgagor to the mortgagee under the bond. But the distinction between the two payments is this. As stated in Cholmondeley v. Clinton, (1) "payment of the interest operates..... to keep alive the mortgage-debt. It is a continued mutual recognition of his (the payer's) title as mortgagor and that of the person to whom the payment is made as mortgagee." "If no interest upon the mortgage had been paid by any one..... (i.e. for the statutory period), possession in the mortgagee would have decided the question of title in favour of that possession," because "the actual possession of the mortgagee, continued... for such period without any payment of interest by the mortgagor, or anything done or said, during that period to recognise the existence of the mortgage, or to acknowledge it on the part of the mortgagee, would clearly operate as a bar to redemption by the mortgagor." Thus the mortgagor, Mrs. Damer, must have known that if she were not paying interest all that period, either somebody else must have been doing so, or, if the mortgagee were in actual possession, then her right to redeem would be barred. But for the necessity for the payment of interest, the judgment shows (page 187) "actual possession by the mortgagee might have had a different effect, because that would have been consistent with her (Mrs. Damer's) title, and not adverse to it."

But, in the present case, there was nothing to show the plaintiffs that any one else was assuming the character of the mortgagor, for as plaintiffs were under no necessity to redeem at any one particular moment within the statutory period, they had no reason to suppose that if they did not redeem, either somebody else must be doing so, or that redemption would be barred. In a case such as *Cholmondeley* v. *Clinton* "payment of the interest of the mortgage by the person claiming to be mortgagor to the mortgagee, is a recognition of the right and title of the mortgagor, and preserves it unbarred; but it cannot be deemed a recognition of the right or title of any other person to be the mortgagor. It is an act of directly contrary import. By making the payment in his own name, and on his own

^{(1) (1820) 2} J. & W. v. pp. 186, 187.

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account, he (the person claiming to be the mortgagor) takes upon himself to do an act that belongs to the mortgagor, and thereby virtually declares that character to belong to himself" (2 J. & W., page 180). It is further to be borne in mind that in Cholmondeley v. Clinton(1) "the mortgagee having declined the possession, left it as it was before the mortgage, in the mortgagor, who continued in the actual possession and enjoyment of the rents and profits for his own absolute use and benefit, as the equitable owner of the estate," and therefore in a later passage (page 185) "the interest of the mortgage money" is spoken of as "tendered from year to year by the person who, claiming to have succeeded to the original mortgagor in the title to the equity of redemption, is, by the acquiescence of the rightful owner of it, allowed to remain in the quiet and uninterrupted enjoyment of the estate as the sole and admitted owner." So in an earlier passage (page 143) it was said: "So long as the incumbrance continues, the interest must be paid by whoever is the owner of the estate, as much as the taxes or any other outgoing payment. Payment thereof is an admission of the debt and of the title of the mortgagor, but it is no admission of any right existing in any other person to the estate, much less of the right of any person alleged to be the rightful mortgagor. It is, on the contrary, in respect to him, in itself the strongest exercise of adverse possession. It is a public usurpation of the character of the mortgagor, from year to year doing the acts which belonged to it The mortgagee recognised him as such by receiving the interest from him. Horace, Earl of Wimpole, and those who claimed under him, knew this, but never interfered to offer payment themselves, or question its being made by Lord Clinton. They forbore in this respect, as well as every other, to act as the owners of the estate, because they considered that character to belong to the Lord Clinton, and not to themselves. They therefore in so doing recognised and acquiesced in his title, but he did nothing to recognise theirs. On the contrary, his acts were uniformly adverse to it. The laches and non-claim of the one party, and the adverse possession of the other, are as

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strongly exemplified in this instance as in every other." So in another passage (page 142): "The fact of the possession taken by the late Lord Clinton, the exercise of every act of ownership and dominion by the late and present Lord Clinton, the receipt of the rents and profits, the payment of the outgoings, the interest of the old mortgage, the new settlements made..... creating long terms of years for a jointure and raising portions, and for borrowing large sums upon new mortgages, and settling the estate permanently in its family: all this the bill states to have been made known to Horace, Earl of Orford; that he was acquainted with the ground upon which Lord Clinton founded his title, and that he took legal advice upon it; and afterwards deliberately, again consulting his legal advisers, executed the deed of confirmation, expressly recognising the title of Lord Clinton and the acts done by him under it. Upon the death of Horace, Earl of Orford, neither his devisee or heir, though each now sets up a claim to the estate, ever took any steps to prosecute the claim till the present suit when the twenty years had elapsed."

"No doubt," as observed in *Dalton* v. *Angus*, (1) "a failure to interrupt, when there is a power to do so, may well be called laches," and in *Cholmondeley* v. *Clinton* (2) "the same claim might have been preferred in a Court of Equity at any time during the twenty years suffered to elapse (J. & W. 145). There was no pretence of any disability" (page 142).

But this bar to equitable relief on the ground of laches and non-claim could not apply where there was neither knowledge of the assertion of an adverse claim to the equity, nor any act done by another which it was necessary for the claimant to do to preserve his title, and which if not done by him must have been done by and for the benefit of an adverse claimant, unless the equity itself were altogether lost. The adverse possession of the equity was therefore due not to the bare claim as mortgagor, but to the exercise of rights and the doing of acts which amounted to a "public usurpation of the character of the mortgagor," a usurpation of which other persons claiming that character could not, if they professed to retain it, have remained

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ignorant. That was acquiescence with knowledge. And according to "the case put by Lord Redesdale in Hovenden v. Lord Annesley (1) of a tenant disavowing the landlord's title and attorning to another, if the landlord, being apprised of it, acquiesces, the possession of his tenant becomes adverse and the Statute of Limitation will run against him." This, however, would not, under the rulings which follow Womesh Chunder's case⁽²⁾ above cited, apply in India apparently in the case of a suit for possession against a trespasser when the owner is not entitled to immediate possession. Thus the owner could have no power to sue for possession, during the currency of an ijara, and time would run against him, therefore, only on its termination, though prior to that he "might possibly have a right to bring a suit for declaration of title" (Krishna Gobind Dhur v. Hari Churn Dhur (3) which it would be discretionary with the Court to give or refuse (see Mussamut Doolhun v. Lal Beharee(4); Raiah Nilmoney Singh v. Kally Churn (5)). And laches when the law of limitation has determined the period for suit would be no ground for diminishing that period: Juggernath Sahoo v. Syud Shah. (6)

Thus the adverse possession of a right may be entirely distinct from the adverse possession of tangible immoveable property; a right to sue in respect of the former arising possibly on open and avowed assertion or manifest adverse exercise of such right, while, on the other hand, the right to sue in respect of the possession and the consequent running of time under article 144 of the Indian Limitation Act in respect thereof can commence only when the possession itself (and not a mere claim to some minor right) becomes adverse to the rights of the person alleging title, which it cannot be as long as that person is not entitled to claim possession. And Chinto v. Janki 7 shows that for a mortgagor to be entitled to claim immediate possession on the ouster of the mortgagee, there must be "virtual dispossession" of the mortgagor as well as of the mortgagee. In other words, there must be something done or declared, excluding his power to resume possession at will, as unmistakeably as physical ouster would.

^{(1) (1806) 2} Sch. & Lef. 624 quoted in 2 J. & W. p. 18.

^{(2) (1869) 10} Cal. W. R. 15.

^{(3) (1882) 9} Cal. 367 v. p. 369.

^{(4) (1872) 19} W. R. 32.

^{(5) (1874) 23} W. R. 150 P. N. (6) (1874) 23 W. R. 99 P. C.

^{(7) (1892) 18} Bom. 51.

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The Privy Council case of Karan Singh v. Bakar Ali Khan (1) shows that whereas under section 1, clause 12, of Act XIV of 1850 a suit for possession of immoveable property must be brought within twelve years from the time when the cause of action arose, under article 145 of schedule II of Act IX of 1871 (and therefore under article 144 of Act XV of 1877), suits for possession must be brought within twelve years from the time when the possession of the defendant, or some person through whom he claims, has This decision, as explained become adverse to the plaintiff. in Faki Abdula v. Babuji Gangaji,(2) means, when taken with that of Mohima Chunder v. Mohesh Chunder, (3) that where a plaintiff has been in possession, and has been dispossessed, he must show possession and dispossession within twelve years, but where there is no allegation of original possession in the plaintiff lost by dispossession or discontinuance of possession, then the party relying on adverse possession to displace a proved or admitted title must show such adverse possession to have commenced and continued from twelve years prior to suit. In the first-mentioned case the plaintiff admits adverse possession at least to have commenced. In the second he does not. In the first case, therefore, having admitted ouster, he has to show that the adverse possession, which he admits has begun to run against him, dates from a time too recent to allow of its ripening into a statutory title. In the second, when there has been no such ouster as to give notice of the adverse nature of the possession, it is incumbent on the person alleging that the title set up against him is barred by twelve years of adverse possession, to show, not only that his possession has lasted for twelve years, but that it has all the time been in open conflict with the title on which the plaintiff relies. The result is, as above indicated, if there has been no ouster or "open and notorious act of taking possession," then the person relying on his possession to defeat title, must show that it was of such a nature, and involved the exercise of rights so irreconcileable with those claimable by the plaintiff, as to give the plaintiff

> (1) (1882) 5 All. 1. (2) (1890) 14 Bom. 458.: (3) (1888) 16 Cal. 473. s. c., L. R. 16 I. A. 23.

occasion to dispute that possession (or, in other words, that it was such as to give a cause of action or right to sue for possession) throughout the twelve years next preceding the suit. The mere existence of the claim without possession, actual or constructive, will not suffice as a bar to a title proved or admitted: Secretary of State for India v. Krishnanomi Gupta.(1) And even where there is possession, if it has commenced without any act of dispossession, and is susceptible of explanation by reference to a title not inconsistent with the rights of the person against whom it is set up, or of one holding on behalf of such person or temporarily entitled to exercise his rights, there can be no necessity to call that possession in question, unless and until interference with the right of the person against whom it is alleged has been manifested by acts affecting his existing right, or has otherwise been brought to his knowledge. Viewed from this standpoint, there seems to be nothing irreconcileable in the decisions of Ammu v. Ramakrishna Sastri, (2) Puttappa v. Timmaji (3) and Cholmondeley v. Clinton, (4) on the one hand, and those in Chinto v. Janki (5) and Vithoba v. Gangaram (6) on the other. For, in the first three cases, not only was the mortgagee (the person who represented the claimant and was entitled by his possession to exclude that of the claimant) out of possession, but the possession was taken by a third party who had, to the knowledge of the claimant, the mortgagor, done things which could leave the mortgagor no room for doubting that his rights and position had been usurped. In Ammu v. Ramakrishna, a third party had ousted the mortgagee by contesting the title with the mortgagor face to face. In Puttappa v. Timmaji, a third party had taken the rent which was periodically payable to the mortgagor, and had handed on possession to the defendant. And in Cholmondeley v. Clinton every act of ownership had been exercised to the knowledge and with the acquiescence of his rival. And in all these three cases. the mortgagee's possession ceased, not in favour of a person acting in exercise of the mortgagee's rights, but in favour of a person acting in open opposition to the rights which any one represent-

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^{(1) (1902)} L. R. 29 I. A. 104.

^{(2) (1879) 2} Mad. 226.

^{(3) (1889) 14} Bom. 176.

^{(4) (1820) 2} J. & W. v. pp. 186, 187.

^{(5) (1892) 18} Bom. 51.

^{(6) (1875) 12} Bom. H. C. R. 180.

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ing the mortgagor must have had occasion to exercise. And, therefore, as neither the mortgagee nor any one on his behalf was in possession, any person claiming to represent the mortgagor knew that no one but the mortgagor or his representative had any right to be in possession. In *Cholmondeley* v. *Clinton*, (1) if the mortgagee had been in possession, the lapse of time without recognition of the existence of the mortgage would have barred redemption by the person claiming to be mortgagor. (1) And the claimant who had done nothing whatever to keep the equity of redemption from becoming barred, could not claim that equity which had been preserved by some one else, who had preserved it for his own benefit alone, openly asserting and exercising the right to do so as against that claimant.

And limitation does not begin to run against a plaintiff until he is under some necessity or duty to assert his title: Dewan Manwar Ali v. Unnoda Pershad Roy⁽²⁾; Mussumat Bebea Sahodra v. Roy Jung Bahadur.⁽³⁾

No doubt, as long as the mortgagee is in possession, he and all claiming under him represent the mortgagor's possession. If the mortgagee in possession is dispossessed on grounds affecting only his right, as for instance, his right as heir to represent the original mortgagee, or his right, as in Parmanandas v. Jamnabai, 4 to possession in spite of a third party's lien on the property, then the dispossession of the mortgagee obviously does not imperil or call in question any right of the mortgagor, and the mortgagor is not concerned or entitled to insist on being immediately restored to possession: and the possession taken is not adverse to him and cannot cause time to run against him. To give the mortgagor a right to insist on immediate possession, there must be an unequivocal ouster preventing the possession of the mortgagor from continuing altogether by leaving no room for doubt that the person taking possession does not profess to represent the mortgagor, but to hold in spite of him. In such a case, the mortgagor is as effectually and unmistakeably displaced

^{(1) (1820) 2} J. & W. 187; Story's Equity Jurisprudence, 9th Edn., s. 1028a, Vol. II, p. 215.

^{(2) (1579)} L. R. 7 I, A. 1. (3) (1886) L. R. 8 I. A. 210. (4) (1885) 10 Bom, 49.

as if there had been no mortgage at all. When an ouster takes place in that manner the mortgagor knows that no one is in possession who can represent or continue his possession, or who is entitled preferentially to possession, and, therefore, he becomes entitled (and it is necessary and his duty, if he does not want his right to be barred) to claim possession immediately.

In the present case there was admittedly on the finding of the lower Appellate Court no notice or knowledge, or circumstance that could have given notice or knowledge to the mortgagor, that the defendants' possession was either commenced or continued in opposition to, or displacement of, his rights, or that it would prevent him, on occasion arising, from resuming his power to deal with the subject-matter. He had no reason to suppose that his rights were invaded. And until he had such reason, he could not be under any necessity to take action for recovery. The possession of defendants, therefore, was not adverse to the plaintiffs from the first, and it has not been found that anything has occurred which could have made it so, for a period sufficient to bar this suit.

The decision of the lower Appellate Court is based on a mistaken notion of the law as to what constitutes adverse possession and must, therefore, be set aside, and as unfortunately that Court has failed to decide the further issue arising in the case as to the right of the plaintiffs to redeem, the decree must be reversed and the case remanded for a decision on the merits. Costs will abide event.

ASTON, J.:—The facts as held established by the lower Appellate Court are as follows.

Plaintiffs 1 and 2 are the daughters, and plaintiff 3 the grandson, of the mortgagor Khutubsha, wife of Kondi. Defendants 2 and 3 are the sons of Kondi's brothers. Defendant 1 is the mortgagee. The mortgage was created in 1866. At some time prior to 1885 defendants 2 and 3 entered on the land as the mortgagee's tenants, and presently asserted themselves as mortgagors. They took the mortgagee before a conciliator in 1885 and arrived at an agreement (Exhibit 114) whereby they affirmed this right, and agreed that the mortgage-debt was to be paid off in annual instalments of Rs. 8, the defendant

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retaining possession of the land. It is said that these payments were duly made, so that the lien was extinguished in 1897.

The agreement is dated 21st August, 1885. It was filed as a decree on 27th November, 1885. Plaintiffs commenced the present proceedings on 5th October, 1897, i.e., more than twelve years after the date of the agreement, but less than twelve since it was filed.

On these facts the District Judge has apparently held that the defendants 2 and 3 have not been in adverse possession of the mortgaged property, but that they have been in adverse possession of "the equity of redemption" from 21st August, 1885, because "it is clear that defendants have claimed to hold this as owners and to the exclusion of the plaintiff since that date."

The District Judge further held that it is true that in the present case the plaintiffs had no notice that the defendants had usurped the equity of redemption, but considered that the plaintiff's suit for redemption is governed by article 144, schedule II to the Limitation Act, XV of 1877, and was barred by twelve years' adverse possession of defendants 2 and 3.

Taking the facts as found by the lower Appellate Court, if the defendants 2 and 3 had in fact no right to redeem the plaint land mortgaged to defendant 1, their possession is no better as regards adverse possession than if they had taken from the mortgagee, defendant 1, a transfer or assignment of his mortgage.

The decree must, therefore, be reversed and the case remanded for a decision on the merits.

Decree reversed. Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Batty.

KRISHNOVA NAYAK (ORIGINAL PLAINTIFF), APPELLANT, v. KESHAV BALKRISHNA (ORIGINAL DEFENDANT), RESPONDENT.*

1902. August 7.

Khot—Khoti Settlement Act (Bombay Act I of 1880), section 8—Khoti-nisbat lands—Settlement Officer—Thal—Occupancy tenants—Rents payable by other tenants in absence of agreement with the Khot—Landlord and tenant.

Where in a khoti village the Settlement Officer has determined the share of thal(1) with regard to the occupancy tenancies, and the tenants other than the occupancy tenants do not appear to hold their lands on any terms agreed upon between the Khot and themselves, such tenants are entitled, under section 8 of the Khoti Settlement Act (Bombay Act I of 1880), to pay rent to the Khot at the same rates as are paid by occupancy tenants.

SECOND appeal from the decision of T. Walker, District Judge of Ratnágiri, confirming the decree passed by Ráo Sáheb J. N. Kale, Subordinate Judge of Sangameshvar at Devrukh.

Suit to recover that. By an award, dated the 27th January, 1850, the khoti village of Wanzole was divided between two branches of the Sardesai family. The defendant belonged to one branch; the plaintiff was a mortgagee from the other, and in 1897-98 was the managing Khot of the village. He now sued the defendant, who was a cultivator both of occupancy land and of khoti-nisbat land(2) in the village, to recover one-third that, alleging that to be the amount fixed by the Settlement Officer.

The defendant denied that the Settlement Officer had fixed the amount of that, or that he had authority to do so. He contended that only one-eighth that was payable by him under the above award of 1850.

The following are the material clauses of the award:

4. The defendant claimed partition and possession of his share of all rice lands, inam, khalsa and varkas lands, ancestral lands, trees and house sites in the

* Second Appeal No. 535 of 1901.

- (1) That means the portion of produce due from an under-tenant to the landlord. (Molesworth and Candy's Marathi-English Dictionary (2nd Edition), page 395.)
- (2) Khoti-nisbat lands, i.e., lands held by cultivators most of whom have occupancy and some also transferable rights. (Per Candy, J., in Raghunathrao v. Vasudev. (1899) 23 Bom. 776.)

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KRISHNOV. V. KESHAV. khoti village of Davale, and house sites and thikáns unmeasured according to shares. The plaintiff's share is given to plaintiff and the defendant's share to defendant. Thus the shares of both are partitioned by mutual consent and given in possession of each, respectively, and so received by plaintiff and defendant as follows:

In this way land has been apportioned between plaintiff and defendant by mutual consent. Out of these, thikán Ukadambyacha-mál is given to the share of the defendant and has these boundaries . . . The other lands have no definite boundaries as can be found. Varkas land surrounds them on all sides alike. Stones have, therefore, been fixed to the boundary on the four sides of the lands apportioned to plaintiff and defendant. Within the boundary plaintiff and defendant should cultivate in their own shares, or if they get cultivation done by tenants, they should not pay that to each other. Each should appropriate it to whose share the land is assigned. Details have been given of lands apportioned between both plaintiff and defendant for cultivation in the Gávik lands (khotinisbat); besides these, if either plaintiff or defendant makes cultivation, they should pay each other that at the rate of one-eighth, that is to say, if there is crop of eight maunds, one maund should be taken out for that and divided half and half by both, while if there is a mortgage on behalf of either of the two, one-third should be taken from him by the party whose share is mortgaged.

7. Defendant had mortgaged his half shares in the villages of mouje Wanzole and mouje Dabhole with creditors, and they are in another's management. Hence rice and varkas lands, as well as trees, have not been partitioned in those villages. Therefore after the defendant redeems and recovers the villages from the mortgages, the khásgi cultivated lands should be partitioned according to quality and then both parties should act according to the terms in the fourth clause.

The Subordinate Judge awarded to plaintiff one-third that in respect of the occupancy lands, holding that the Settlement Officer had determined it; but in respect of the khoti-nisbat lands he awarded one-eighth that, holding that clause 4 of the award (Exhibit 49) applied to them, and that the Settlement Officer had not determined the that in respect to them. In his judgment he said:

As regards khoti-nisbat land. The Settlement Officer has not determined that in respect thereof. Plaintiff has adduced no evidence to show the previous custom as to levy of that in respect of khoti-nisbat lands. I therefore accept the version given by the defendant in his written statement and corroborated to a certain extent by the terms in the award (Exhibit 49), and I hold one-eighth that is payable in respect of khoti-nisbat lands.

On appeal the District Judge confirmed this decree.

The plaintiff appealed to the High Court.

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Scott (Advocate General) (with him M. R. Bodas) for the appellant (plaintiff):—The case mainly rests on the construction of the award. It was made between the ancestors of the defendants and their bhaubands from whom the plaintiff derives his title as mortgagee of a half share. Plaintiff is entitled to one-third thal, as determined by the Settlement Officer. award does not prevent it. Clause 4 of the award, on which the lower Court relied, does not apply to Wanzole village, and is besides, according to clause 7, not to come into operation until the village is redeemed from the mortgage and partitioned. A moiety of the village was under mortgage in 1850, the date of the award, from which it was finally redeemed only in June, 1897. It is not yet partitioned. There being, therefore, no agreement, section 8 of the Khoti Settlement Act (Bombay Act I of 1880) applies, and one-third thal must be paid in respect of khoti-nishat lands.

C. H. Setalvad (with him D. A. Khare) for the respondent (defendant):—The point raised by the appellant was not raised by him in the lower Court: he cannot, therefore, raise it now. Clause 7 of the award (Exhibit 49) does not bear the interpretation that the rule of one-eighth thal was to operate only after partition. Redemption and partition are not made necessary preliminaries.

Scott in reply:—The award is not held by the Subordinate Judge to be binding on the parties: he only uses it as corroborative evidence of the rent levied on khoti-nisbat lands. Section 8 of the Khoti Settlement Act (Bombay Act I of 1880), however, is explicit: wherever there is no agreement, all tenants, other than occupancy tenants, must pay at the same rate as occupancy tenants. The Subordinate Judge has awarded one-third thal on occupancy lands in the village and the plaintiff is, therefore, entitled to the same rate in respect of khoti-nisbat lands.

Batty, J.:—The appellant in this case objects that the award (Exhibit 49), limiting the liability of defendant to one-eighth of the produce for *khoti-nishat* land in Wanzole, was subject to

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the condition precedent that partition should be first effected. The respondent contends that this objection was not raised in the lower Courts and cannot be taken now. The judgment, however, of the Court of first instance, adopted by the lower Appellate Court, does not treat the award as concluding the parties, but after observing that it does not help the defendant at all, refers to it only as evidence corroborative of the defendant's statement as to the customary rate of thal in respect of khoti-nisbat lands which the judgment states was left undetermined by the Settlement Officer in respect of the land in question. But the lower Court has found that, with regard to occupancy tenancies, the Settlement Officer has determined the share of thal to be one-third for all khátedárs, other than certain specified classes, to which defendant does not belong, and section 8 of the Khoti Act of 1880 provides that tenants, other than occupancy tenants, shall hold their lands on the terms agreed upon between the Khot and themselves, and in the absence of such agreement shall be held liable to payment to the Khot at the same rates as are paid by occupancy tenants. The plaintiff was not under the necessity of showing the award to be inapplicable as the lower Courts did not make it the basis of decision, and the defendant has not objected to their decision or shown that it could operate in the absence of partition, and the rate must, therefore, be determined in accordance with section 8, i.e., in accordance with the rates fixed for occupancy tenants in Wanzole.

The decree of the lower Appellate Court is, therefore, amended and the plaintiff's claim to recover, for the year in suit, that at the rate of one-third is awarded in respect of the khoti-nisbat lands in Wanzole. There is no dispute as to the amount of the produce held proved by Exhibit 31 in the judgment of the Subordinate Judge against whose decision the defendant has not appealed. The defendant is to pay all costs of this appeal.

Decree amended.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Batty.

BALAJI RAMCHANDRA DESHPANDE (ORIGINAL DEFENDANT),
APPELLANT, v. DATTO RAMCHANDRA (ORIGINAL PLAINTIFF),
RESPONDENT.*

1902. September 16.

Vatan—Adoption of a person not a member of the Vatandár family—Gordon Settlement—Vatan Act (Bombay Act III of 1874).

A sanad with respect to vatan property which was subject to the Gordon Settlement contained the following clauses:

2nd.—No nazrana or other demand on the part of Government will be imposed on account of the succession of heirs, lineal, collateral or adopted, within the limits of the Vatandár family, and permission to make such adoptions need not hereafter be obtained from Government.

3rd.—When all the sharers of the vatan agree to request it, then the general privilege of adopting at any time any person (without restriction as to family) who can be legally adopted, will be granted by Government to the vatan on the payment from that time forward in perpetuity of an annual nazrána of one anna in each rupee of the above total emoluments of the vatan.

It was contended that the adoption of a person who did not belong to the Vatandar family in respect to whose vatan the said sanad was granted, was invalid.

Held, that the sanad did not prohibit such an adoption and that the adoption in question was valid.

APPEAL from the decision of Ráo Bahádur V. V. Paranjpe, First Class Subordinate Judge of Sátárá.

The plaintiff sued to obtain a declaration of his right as adopted son of Kondo Narayan Deshpande and his widow Savitribai, and to recover possession of certain property.

The defendant denied the plaintiff's adoption, and also contended that, even if proved, it was invalid inasmuch as the ceremony had been performed while the plaintiff's adoptive mother was in mourning. He further pleaded that the property in suit was Deshpande vatan and was subject to the Gordon Settlement, and that by the Gordon Settlement and the sanad issued thereunder the adoption of a stranger into a Vatandar family was not permitted; that the plaintiff was not a member of this Vatandar family to which the property in suit belonged, and that

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his adoption was therefore illegal: see also Vatan Act (Bombay Act III of 1874).

The following is the material portion of the sanad issued under the Gordon Settlement referred to:

Whereas in the zilla of Sătará certain lands and cash allowances are entered in the Government accounts of the year 1886-87 as held on service traure (here follow the description of lands and cash allowances), and whereas the holders thereof have agreed to pay to Government a fixed annual payment in lieu of service,

It is hereby declared, that the said lands and eash allowances shall be continued hereditarily by the British Government on the following conditions, that is to say, that the said holders and heirs shall continue faithful subjects of the British Government, and shall render to the same the following fixed yearly dues:.....In consideration of the fulfilment of which conditions:

1st.—The said lands and cash allowances shall be continued without demand of service, and without increase of the land-tax over the above fixed amount, and without objection or question on the part of Government as to the rights of any holders thereof, so long as any male heir to the vatur, lineal, collateral or adopted, within the limits of the Vatandár family, shall be in existence.

2nd.—No nazrána or other demand on the part of Government will be imposed on account of the succession of heirs, lineal, collateral or adopted, within the limits of the Vatandár family, and permission to make such adoptions need not hereafter be obtained from Government.

3rd.—When all the sharers of the vatan agree to request it, then the general privilege of adopting at any time any person (without restriction as to family) who can be legally adopted, will be granted by Government to the vatan, on the payment from that time forward in perpetuity of an annual nazrana of one annual neach rupee of the above total emoluments of the vatan.

The Judge allowed the plaintiff's claim and passed the following decretal order:

The defendant appealed.

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Branson (with B. A. Bhagvat) for the appellant (defendant): Our main contention is that the adoption is inoperative with respect to the Deshpande vatan property in dispute. The Gordon Settlement applies to this vatan. By the terms of the sanad issued under that settlement, if a person who is not a member of the Vatandar family is adopted, such adoption must be sanctioned by Government and nazrána must be paid; the plaintiff was not a member of the family to which this vatan belonged: Appaji Bapuji v. Keshav Shamrav,(1) Madhavrav Manohar v. Atmaram Keshav. (2) When a settlement is made with a Vatandár under the Gordon Settlement, the Vatandár undertakes to obtain the sanction of Government in case of an adoption. This provision is made with a view to prevent the alienation of the vatan (section 15 of the Vatan Act). The third clause of the sanad provides that in case of the adoption of a person outside the Vatandár family, all the members of the Vatandár family must consent.

Chimanlal H. Setalvad (with M. V. Bhat) for the respondent (plaintiff):—Irrespective of the Gordon Settlement there is nothing which prohibits the plaintiff's adoption. There is no restriction in the Vatan Act that the person adopted must be a member of the Vatandár family. A person outside the family can be adopted, and once adopted, he becomes a Vatandár with all a Vatandár's rights.

Next, does the Gordon Settlement prohibit the plaintiff's adoption? As to the operation and effect of that settlement, see Appaji Bapuji v. Keshav Shamrav. (1) It did not alter the nature of the vatan property. Its object was to protect the rights of Government as between Government and Vatandars. It did not affect the rights of the Vatandars inter se.

[Jenkins, C.J.:—If a Vatandar cannot alienate his vatan in favour of a person outside the vatan family, can he create a right in favour of an outsider by adopting him?]

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Yes, because the adopted son fully represents and takes the place of a natural born son. There is no distinction between the rights of the two. Under Regulation XVI of 1827 there was no restriction of adoption. Act XI of 1843 contains no provision against alienation nor against the adoption of an outsider. Section 4 of the present Vatan Act distinctly recognizes the right to adopt. So far as legislative enactments are concerned there is nothing in them prohibiting such an adoption. The Gordon Settlement did not affect the rights of succession, &c., amongst the Vatandárs inter se.

It is not competent to the Collector to determine who is a Vatandár and who is not. He can pass orders for the restoration of vatan property on the assumption that the person in whose favour he passes the order is a Vatandár: Ramran v. The Secretary of State for India. The question of status as Vatandár can be determined by a Civil Court.

Branson in reply.

Jenkins, C.J.:—The plaintiff has brought this suit for a declaration of his right as adopted son of Kondo Narayan Deshpande and his widow Savitribai and to recover possession of the plaint lands. In the lower Court he has been successful, and the defendant has appealed.

The points urged before us are: first, that the adoption is not proved; secondly, that, if proved, it is invalid; and thirdly, that, in any case, it is ineffective to create a title in the plaintiff to so much of the plaint lands as are vatan property. It is the third of these points alone that calls for serious discussion, for Mr. Branson has in effect conceded (after stating the facts) that the theory of Savitribai's being under sutak (which was relied on as a circumstance both invalidating and making improbable the alleged adoption) could not be supported on the evidence, inasmuch as the relationship that would impose sutak had not been proved. On a consideration of the facts I have no hesitation in affirming the decision of the Subordinate Judge as to the fact and validity of the adoption. Therefore, I at once proceed to the third and more important point.

The argument in favour of this line of defence is principally rested on the terms of the sanad settling the vatan property, which ran as follows:

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Whereas in the zilla of Sátárá certain lands and cash allowances are entered in the Government accounts of the year 1886-87 as held on service tenure (here follow the description of lands and cash allowances), and whereas the holders thereof have agreed to pay to Government a fixed annual payment in lieu of service,

It is hereby declared, that the said lands and cash allowances shall be continued hereditarily by the British Government on the following conditions: that is to say, that the said holders and heirs shall continue faithful subjects of the British Government, and shall render to the same the following fixed yearly duesIn consideration of the fulfilment of which conditions:

1st.—The said lands and cash allowances shall be continued without demand of service, and without increase of land-tax over the above fixed amount, and without objection or question on the part of Government as to the rights of any holders thereof, so long as any male heir to the vatan, lineal, collateral or adopted, within the limits of the Vatandár family, shall be in existence.

2nd.—No nazrána or other demand on the part of Government will be imposed on account of the succession of heirs, lineal, collateral, or adopted within the limits of the Vatandár family, and permission to make such adoptions need not hereafter be obtained from Government.

3rd.—When all the sharers of the vatan agree to request it, then the general privilege of adopting at any time any person (without restriction as to family) who can be legally adopted, will be granted by Government to the vatan, on the payment from that time forward in perpetuity of an annual nazrana of one anna in each rupee of the above total emoluments of the vatan.

The third clause, it is urged, is a bar to an adoption by a single Vatandár without both the request of the other Vatandárs and the consent of Government.

But to appreciate the force of the words used in this sanad, one must see what in this respect was the position prior to the Gordon Settlement (for this sanad was issued under the scheme familiar under that name) of Vatandars. The earliest British legislation on the subject of vatans is to be found in Regulation XVI of 1827, section 20. Prior to that a Vatandar's power of alienation appears to have been unfettered, at least so far as his co-Vatandars were concerned. According to Mr. Steele, however, the consent of the Sirkar and of the pergunnah Vatandars was necessary to adoptions by Vatandars. Nazar, too, was paid to the

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Native Government on occasions of granting permission (Steele's Law and Custom, 183). This view apparently is based on the information received from the Poona castes (see page 386).

How far, however, the consent of the Government and the kinsmen ever was requisite for a legal adoption is at least Thus, in the Dattaka Mimansa it is laid down that kinsmen and relations should be "earnestly invited," and notice to the king is enjoined (section V, pl. 8 and 42), but it is clear that the failure to observe these behests would not now invalidate the adoption: for "the invitation of kinsmen and the others is for the sake of their witnessing: in the same manner as the invitation of the king" (ibid, pl. 9). It would seem that the participation of the king and the kinsmen was evidentiary and not essential. The cited passages from the Dattaka Mimansa make it probable that the usual practice was to act in accordance with what is there enjoined, and it may be that the information received from the castes merely recorded that which was customary in practice. Be that however as it may, it was determined as far back as 1870 (1) by a Division Bench of this Court "that a formal adoption should not be set aside because it has not received the sanction of the ruling power, and that there are no good grounds for the argument that a distinction should be made when the property to be inherited is of the nature of a vatan." This was followed in Narhar Govind Kulkarni v. Narayan Vithal, (2) where the objection urged against the adoption was that it was invalid, inasmuch as it had been strictly prohibited by the Government. Sir Michael Westropp, in delivering the judgment of the Court, said (p. 609):

We have here simply to deal with the office of a Kulkarni and its appendant rights or vatan. No authority, either in a text-book of Hindu Law nor in the reports, has been cited to show that the sanction of Government to an adoption by a Kulkarni, or his widow, or by a coparcener in a Kulkarniship, or his widow, is necessary to give it validity, or that Government has any right to prohibit or otherwise intervene in such an adoption. It has been argued for the appellant (the defendant) that Government ought to have a voice in such a matter in order to insure to itself a succession of suitable hereditary officers. No such right of intervention in adoption was claimed for Government by Act XI of 1843, when, if such a right existed, we might fairly expect to find that

See Ramchandra V. Nanaji, (1870) 7 B. H. C. R. 26 p. 30.
 (2) (1877) 1 Bom. 607.

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it would have been recognized; and sections 33 and 34 of Bombay Act III of 1874 are inconsistent with the existence of any such right. The provisions of these sections seem to be in accord with the passage in Steele's Hindu Law, page 51, para XL, 1st edition; page 45, para XL, 2nd edition, where it is said: 'It is enjoined that notice of an adoption should be given to the relations within the sagotra sapinda and to the Rája, though no provision appears in case of their disapprobation, even in adoption by widows.' Those Acts made sufficient provision for securing to Government the services of competent officiators: so that no such objection, in that respect, as suggested by the appellant's pleader, can arise. In the case of Ramchandra v. Nanaji(1) the defence was that the adoption had been disallowed by Government; but that defence failed in the High Court. That, like the present case, related to vatan appendant to the office of Kulkarni.

The decisions, it is true, only deal expressly with the question whether the *Government's* assent is required, but I find from the paper book in appeal No. 313 of 1876 that the defendant pleaded that the adoptive mother was not justified in adopting without the consent of her *bhaubands*. In my opinion the consent of the *bhaubands* was as little necessary to the validity of an adoption among Vatandárs as under the general Hindu Law.

Such, then, being the law apart from the scheme of the Gordon Settlement, has the sanad in this case framed in accordance with that settlement rendered the consent of the Government and the kinsmen necessary? This is a question of construction of the sanad which I have read in an earlier part of my judgment.

In construing this document it must be borne in mind that it relates to the whole vatan and not merely to a takshim in the vatan. Looking then to the terms of the sanad, nowhere is any express prohibition imposed on adoption, whether the person proposed for adoption was or was not a member of the Vatandár family; but while in the second clause there is express provision that no nazrána shall be chargeable in respect of the adoption of a member of that family, the third clause provides for the recognition by Government of a general power to adopt without restriction as to family on the entire body of Vatandárs accepting liability to a perpetual nazrána in consideration thereof, and applying collectively for the purpose. There has been some discussion before us as to how the words "lineal,

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collateral or adopted, within the limits of the Vatandár's family," should be read; for the punctuation of those words in the first clause agrees neither with the phraseology of the vernacular, nor with the punctuation in the second paragraph, while at the same time it is only by adherence to the punctuation in the first clause that tautology is escaped. I do not, however, think it necessary in reference to this to do more than express surprise that, in a document of this class, such want of care should have been shown; and I so think because, whichever way the words be read, I fail to see that the document can or does create in favour of kinsmen a right to object that would not otherwise exist. In my opinion, therefore, the adoption in this case is valid and affected the succession to the vatan lands to the extent that the plaintiff has become entitled to succeed thereto as against the other Vatandárs.

But in so holding I do not mean to say that the tenure of the lands would be prolonged or the rights of Government would be curtailed in case the body of Vatandárs were to die out and the plaintiff or his successors were alone left to claim the vatan lands. As to this I would repeat what was said in Ramchandra's case: (1) "We consider that the result of the suit will not affect the interests of Government, and that we should, therefore, confine ourselves to the point at issue between the parties who are before the Court."

The decree will be confirmed with costs.

BATTY, J.:—It may perhaps be worthy of notice that lands held for service were, both by clause 2 of section 1 of Bombay Act II of 1863 and by clause 2 of section 2 of Bombay Act VII of 1863, expressly excepted from the category of holdings in respect of which, under those enactments, an indefeasible, heritable and transferable title was claimable on acceptance, by the holders for the time being, of the terms prescribed.

By clause 3 of section 2 of the latter Act, lands held for service were declared resumable or continuable under such rules as Government might think proper from time to time to lay down. And under section 16 of Bombay Act II of 1863, as under section 32 of Bombay Act VII of 1863, the phrase lands held for service" was declared applicable to all lands granted, held or continued nominally for the performance of service whether performed or not, or partly in consideration of past and partly for the performance of prospective service; but the phrase was not to include lands granted solely in consideration of past services, i.e., the heritable and transferable estate was not claimable as of right in respect of lands pro servitis impendentis or pro servitis impensis et impendentis. But the question whether any particular lands fell within this class or not, was left by both the sections to the decision of Government.

The result appears to be that so far as lands held pro servitiis impendendis or pro servitiis impensis et impendendis were concerned, Government could determine the conditions on which they should be continuable or determinable. But while reserving this power to Government, the Legislature seems to have left the devolution of interests among the members to whom they were continuable, to be determined by the ordinary law governing the community to which those members belonged. If that ordinary law recognized an unrestricted right of adoption, the power given to Government of deciding as to the conditions of continuance, had no operation on that right so long as those conditions of continuance remained satisfied. And reading the sanad in the light of the provisions of law above referred to, it would appear that the clause relating to the unrestricted right of adoption could have had reference only to the rules determining the continuance, and not to the principles of devolution that were to regulate the interests in question.

While the rights of individuals were left untouched by the sanads, Government offered to relax the rules as to the continuance of the collective rights, on the whole body undertaking, thenceforward in perpetuity, a liability for an additional payment under the name of nazrána, as consideration (not for any modification of their rights *inter se*, which were settled by the law whereto they were subject, and not by Government, but) for an enlargement of the conditions to which under pre-existing rules or practice Government had theretofore subjected the continuance of lands held for service.

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The sanads, therefore, appear only to determine what Government had power to determine—the conditions of continuance or resumption and the terms on which such conditions would on application and payment be enlarged; but, so long as those conditions were fulfilled, no more affected the right which adoption might confer than the right which survivorship or inheritance might confer under the law applicable to the holders.

Decree confirmed.

CRIMINAL REVISION.

Before Mr. Justice Crowe and Mr. Justice Aston.

1902. September 25. EMPEROR v. VARJIVANDAS alias KALIDAS BHAIDAS.**

Jurisdiction—Revisional Jurisdiction of High Court—Criminal Procedure Code (Act V of 1898), sections 423, 439—Presidency Magistrate—Discharge of accused person under section 209 of Criminal Procedure Code (Act V of 1898)—Order of discharge set aside by High Court and order made that accused be arrested and committed for trial at the Sessions of the High Court—Practice—Procedure—Sufficient ground for committing for trial, what is.

Under sections 439 and 423 of the Criminal Procedure Code, the High Court has jurisdiction to set aside an order of discharge passed by a Presidency Magistrate, if such preliminary be necessary, and to direct that a person improperly discharged of an offence be arrested and forthwith committed for trial.

The fact, that by section 439 of the Criminal Procedure Code (Act V of 1898) the High Court in its revisional jurisdiction may exercise all the powers given to it as a Court of Appeal (by section 423), except (see paragraph 4) the power of converting a finding of acquittal into one of conviction, seems to point to the conclusion that all other powers not expressly excluded may be exercised by the High Court as a Court of Revision.

The words in section 209 of the Criminal Procedure Code "sufficient ground for committing" mean, not sufficient ground for convicting, but refer to a case in which the evidence is sufficient to put the accused on his trial, and such a case arises when credible witnesses make statements which, if believed, would sustain conviction. It is not necessary that the Magistrate should satisfy himself fully of the guilt of the accused before making a commitment. It is his duty to commit when the evidence for the prosecution is sufficient to make out

^{*}Criminal Application for Revision, No. 142 of 1902.

a prima facie case against the accused, and he exercises a wrong discretion if he takes upon himself to discharge an accused in the face of evidence which might justify a conviction.

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Rule granted under section 435 of the Criminal Procedure Code (Act V of 1898) to the Public Prosecutor, calling on Varjivandas alias Kalidas Bhaidas to show cause why the order passed by Mr. Binning, Acting Chief Presidency Magistrate, discharging him under section 209 of the Criminal Procedure Code, should not be set aside and why he should not be committed to the Court of Sessions for trial on charges under sections 471 and 109 of the Indian Penal Code (XLV of 1860).

The said Varjivandas (with four other accused) was charged before the Chief Presidency Magistrate with using and abetting the use of a forged document, but, under section 209 of the Criminal Procedure Code, was discharged by the Magistrate, who was of opinion that there was no evidence against him.

The Public Prosecutor thereupon applied to the High Court under section 435 of the Criminal Procedure Code (Act V of 1898), contending that sufficient evidence had been given to justify the committal of the accused for trial. The High Court granted the rule as above set forth.

Scott (Advocate General) (with him Nicholson, Public Prosecutor) for the Crown.

Branson (with him G. S. Rao) for the accused.

CROWE, J.:—This was a rule granted to the Public Prosecutor calling on Varjivandas alias Kalidas Bhaidas to show cause why the order passed by Mr. Binning, Acting Chief Presidency Magistrate, discharging him under section 209 of the Criminal Procedure Code (Act V of 1898), should not be set aside and why he should not be committed to the Court of Sessions for trial on charges under sections 471 and 109 of the Indian Penal Code.

Mr. Branson, who has appeared to show cause against the rule, has contended that it is not competent to this Court to set aside the order and direct the commitment of the accused either under the provisions of the Code of Criminal Procedure or under the Charter or the Charter Act, and that the prosecution is not prejudiced in any way because it is open to them to make a fresh

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application, the order of discharge not amounting to an acquittal. The learned Counsel drew our attention to several Calcutta cases in which, he argued, there was considerable divergence of opinion; and submitted that there was no authority in any ruling of the Bombay High Court for the construction which had been placed on section 15 of the Charter Act and section 28 of the Charter by the Calcutta High Court.

The first case to which our attention was drawn is that of Charoobala v. Barendra Nath (1) in which the Court, consisting of Prinsep and Hill, JJ., differing from Ghose and Wilkins, JJ., in Colville v. Kristo Kishore, (2) held that the High Court has powers of revision in respect of an order of discharge passed by a Presidency Magistrate, by reason, not of section 28 of the Letters Patent, 1865, but of section 15 of the Charter Act (24 and 25 Vic., c. 104). Their Lordships added that the High Court had no power under the Code of Criminal Procedure to interfere in revision with an order of dismissal or discharge passed by a Presidency Magistrate. In Colville v. Kristo Kishore (2) the Court had held that under sections 435 and 439, read with section 423 of the Criminal Procedure Code, it had power to revise the proceedings of a Presidency Magistrate and order a further enquiry to be made, and that it had the same power under clause 26 of the Letters Patent of 1865.

We do not think it is necessary to go so far afield as the Charter or Charter Act in order to find authority for the power to revise the proceedings of a Presidency Magistrate, as the provisions of the Criminal Procedure Code seem perfectly clear on the point. The sections which bear on the question of the revisional powers of the Court are sections 435-439. Under section 435 the High Court has power to call for and examine the record of any proceedings before any inferior Criminal Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed. It cannot be contended that the Court of the Presidency Magistrate is not within the term "any inferior Criminal Court," as section 441 explicitly refers to certain proceedings which may be taken by

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any Presidency Magistrate when its record is called for by the High Court under section 435. Section 439 enumerates the powers which the Court may exercise in revision, and it declares that in any proceeding, the record of which has been called for, or reported for orders or otherwise comes to its knowledge, the High Court may in its discretion exercise any of the powers conferred on a Court of Appeal by certain preceding sections. among others by section 423. Now among the various powers specified in section 423 is the power of directing that an accused may be committed for trial. It is not necessary that the Court should be exercising its functions in an appeal from an acquittal. What the law says is that it may exercise the same power in revision, in any proceeding whatever, as it could have exercised in hearing an appeal from an acquittal. This was the view adopted by the Allahabad High Court in Empress v. Ram Lal Singh and others,(1) with which we expressiour concurrence.

But it was contended that this power could not be exercised in the case of an accused person who had been discharged, as special provision had been made for such cases in section 437, which did not include orders of discharge passed by Presidency Magistrates. The answer to that argument appears to be that it was the intention of the Legislature in framing section 439 to make the terms thereof sufficiently wide and comprehensive to cover all cases which were not included in section 437, and that it could never have been intended that the High Court should not possess the same powers with respect to the proceedings of Presidency Magistrates which are specially conferred on Sessions Judges and District Magistrates with respect to the revision of the sentences, findings or orders of the Courts subordinate to them. However that may be, it is clear in the wording of the section that in any proceeding the powers enumerated in section 423 may be exercised, subject only to the limitation set forth in paragraph 4, that nothing in the section shall be deemed to authorise a High Court acting in revision to convert a finding of acquittal into one of conviction. The fact that this particular power, which is conferred by section 423 on Courts in the exercise of their appellate jurisdiction, is excluded in express

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terms in section 439 seems clearly to point to the conclusion that all the other powers not expressly excluded may be exercised by the High Court as a Court of Revision. We notice that in the Full Bench decision in Hari Dass Sanyal v. Saritulla, (1) Wilson, J., whose judgment was concurred in by a majority of the Court, stated his opinion that the High Court, under section 423 embodied in section 439, could set aside an order of discharge and direct a charge to be framed and tried by the proper Court. After pointing out that sections 435 to 439 must be read together, and reciting the terms of section 435, he remarks: "This I read as an express enactment that every finding, sentence or order is liable to review, not only on the ground of illegality or irregularity, but also on the ground of incorrectness, that is to say, on the ground that it is wrong on the merits. And an order of discharge is no exception to the general rule. I do not mean to say that an order of discharge may not, under the subsequent sections, be set aside on other grounds, such as the discovery of fresh evidence, but only that it is liable to be so dealt with on any of the grounds here mentioned.

"The second point for enquiry is, what tribunals have jurisdiction to set aside an order of discharge? This Court has power under section 439 to deal as a Court of Revision with any finding, sentence or order which comes under its notice." In consideration, then, of sections 439 and 423 of the Criminal Procedure Code when read together, we think it is clear that the Court has jurisdiction to set aside an order of discharge if such preliminary be necessary, and to direct that a person improperly discharged of an offence be arrested and forthwith committed for trial, and this view is covered by the authorities.

The next point which arises is whether the order of discharge was illegal or incorrect or otherwise improper, i.e., was it wrong on the merits? The order of the Presidency Magistrate is briefly expressed in these words: "No. 4 is discharged for want of evidence." The words in section 209, "sufficient ground for

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committing," have been explained to mean, not ground for convicting, but where the evidence is sufficient to put the accused on his trial, and such a case arises when credible witnesses make statements which, if believed, would sustain conviction. The weighing of their testimonies with regard to improbabilities and apparent discrepancies is more properly a function of the Court having jurisdiction to try the case. It is not necessary that the Magistrate should satisfy himself fully of the guilt of the accused before making a commitment. It is his duty to commit when the evidence for the prosecution is sufficient to make out a primal facie case against the accused, and he exercises a wrong discretion if he takes upon himself to discharge an accused in the face of evidence which might justify a conviction.

It is contended by the learned Advocate General that there was sufficient evidence before the Magistrate to justify the committal of the accused and he refers to the admissions made by accused himself before Mr. Karsandas Chhabildas, Third Presidency Magistrate, to the prima facie evidence of a conspiracy between all the accused and the evidence as to what was said, done or written by the other accused in reference to the common intention as bearing on the guilt of the accused, and also to the evidence of several independent witnesses examined in the course of the enquiry as to the conduct of the accused. It seems hardly necessary to go beyond the statement made by accused to Mr. Karsandas Chhabildas who has been examined as a witness in the case. He states that accused was brought to his bungalow, and he asked him if he wished to make a statement, and if any inducement or threat had been used, or any police officer had told him to tell an untruth, and he said "No," but he wanted legal advice and asked the witness to give him advice, which he refused to do and also refused to take down his statement. After some further conversation he went away and returned in the afternoon, when he made a statement, in the course of which he said that accused 2 asked him to have a copy made of the will the draft of which was produced by accused 2; that he got it copied in a book by a Brahman in a house in Barbhaya Moholla; that Vithal Jumakhram attested it in his presence; that he asked accused 2 why this was done as there was no signature, and that accused 2 replied that Vithaldas might turn round, it was better

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Without going into the question of the documentary and other evidence respecting which contentions as to its admissibility have been raised, we think it sufficient to say that there is on the record of the magisterial enquiry sufficient primâ facie evidence to require the committal of the accused for trial by the Court of Session.

We therefore direct that the accused Varjivandas alias Kalidas Bhaidas be committed to the Court of Session on the charges under sections 471 and 109 of the Indian Penal Code.

ASTON, J.: - I am of the same opinion. Jurisdiction to order committal of an accused person who has been improperly discharged under section 209 of the Criminal Procedure Code is clearly given to a High Court by section 439, whether the inferior Court which discharged the accused be a Presidency Magistrate or not. It is not necessary that there should be a right of appeal in order that the High Court may exercise the revisional power conferred by section 439. Seeing that this power to order in revision that an accused who has been improperly discharged shall be committed is clearly given by section 439 by express words, it is more reasonable to treat the power conferred by section 437 on a High Court to order further inquiry in the case of any accused person who has been discharged as redundant, than to treat section 437 as restricting the power expressly conferred by section 439 to order committal for trial.

On the merits I concur that the evidence recorded by the Magistrate who made the magisterial enquiry and committed

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other accused persons for trial establishes as against the accused Kalidas Bhaidas a prind facie case such as to require the committal of this accused on the charges specified.

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As to the form which this Court's order should take, I would add, because much was said at the hearing as to this Court's power to set aside an order of discharge, that I know of no warrant or authority in the Code of Criminal Procedure for the doctrine that an order of discharge under section 209 needs to be set aside before an order for committal of an accused person, held to be improperly discharged, can be made. Section 403 of the Criminal Procedure Code seems to be authority to the contrary. The learned Advocate General, however, asked, I presume ex majore cautela, that this may be made part of this Court's order if the accused be ordered to be committed for trial, and such an order has accordingly been included.

APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Aston.

RAMJI HARIBHAI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, v. BAI PARVATI (ORIGINAL DEFENDANT), RESPONDENT.*

1902. September 30.

Transfer of Property Act (IV of 1882), section 59—Attestation of mortgagebond—Meaning of the word "attested"—Attestation in the presence of the mortgagor after having received from him a personal acknowledgment of his signature.

A mortgage-bond was signed by the mortgagor, was attested by three witnesses and was duly registered. In a suit for the mortgage-debt it appeared from the evidence that none of the attesting witnesses had actually seen the execution of the deed by the mortgagor, but must have attested merely on the mortgagor's admission of his signature. The lower Courts held that this was not sufficient under section 59 of the Transfer of Property Act (IV of 1882), and that the mortgage was, therefore, invalid. On appeal to the High Court,

Held, that the attestation was sufficient. A mortgage-deed is attested within the meaning of section 59 where the witnesses have signed it in the presence of the mortgagor after having received from him a personal acknowledgment of his signature.

Abdul Karim v. Salimun(1) dissented from.

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SECOND appeal from the decision of E. H. Leggatt, Assistant Judge, F. P., at Broach, confirming the decree passed by Rao Saheb Tribhovandas Lakshmidas, Subordinate Judge of Broach.

Suit by a mortgagee to recover money due on his mortgage.

Plaintiffs sued to recover Rs. 199 on a mortgage-bond, dated the 4th November, 1895. The plaint prayed for the sale of the mortgaged property and also generally for payment of the sum claimed out of the estate of the deceased mortgagor.

The mortgage-bond was duly executed by the mortgagor and was registered. It was attested by three persons, two of whom were dead at the date of the suit, and the third deposed that he did not actually see the bond executed, but that the mortgagor admitted execution of the deed to him.

The Subordinate Judge passed a decree for the plaintiffs for the amount claimed, and ordered that the amount should be recovered out of the estate of the deceased mortgagor. He, however, refused to order the sale of the mortgaged property, holding that under section 59 of the Transfer of Property Act the deed was invalid as a mortgage. He was of opinion that the evidence showed that the attesting witnesses did not witness the execution of the deed, and that their attestation was not of the execution, but merely of the admission by the mortgagor of the execution of the deed, and on the authority of Girindra Nath Mukerjee v. Bejoy Gopal (2) and Abdul Karim v. Salimun(1) he held this to be insufficient and that the mortgage was invalid. In his judgment he said:

As the mortgage-bond has been signed by the deceased Dayal Lakshmidas with his own hand and duly registered, I have no doubt about its execution by him.

The defendant's pleader has contended that the mortgage-bond is not valid as the requirements of section 59 of the Transfer of Property Act have not been complied with, and his contention appears to be sound. Under that section a mortgage for one hundred rupees or upwards is required to be effected by a registered instrument signed by the mortgager and attested by at least two witnesses. Now, the mortgage-bond sued upon is signed by the mortgager and attested by three witnesses, but the first attesting witness, Kasandas Mancharam, has stated that Dayal Lakshmidas who executed it admitted having signed it, and

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the other two attesting witnesses, Harji Girdhar and Pranjivan Waghji, are unfortunately dead, but they must have attested the mortgage-bond after Kasandas Mancharam attested it, and as their attestations appear to have been written with a different ink they could not have witnessed the execution of the mortgage-cond. The attestation required by section 59 of the Transfer of Property Act, as held in Girindra Nath Mukerjee v. Bejoy Gopal Mukerjee (1) and Abdul Karim v. Salimun, (2) is an attestation by witnesses of the execution of the document and not of the admission of execution, and as there is rothing to show that the mortgage-bond sued upon was signed by the executant Dayalbhai Lakshmidas in the presence of two attesting witnesses, I hold that the requirements of section 59 have not been complied with and that the mortgage-bond in suit is not valid according to law.

On appeal this decree was confirmed by the Assistant Judge, F. P.

Plaintiffs appealed to the High Court.

G. S. Rao for the appellants (plaintiffs):—The lower Courts have erred in interpreting the word "attested" in section 59 of the Transfer of Property Act (IV of 1882). They have unnecessarily narrowed the sense the word ordinarily bears. In the Indian Succession Act (X of 1865), section 50, clause (3), the word "attest" is meant to include attestation by a person who has received from the testator a personal acknowledgment of his signature or mark, and there is no reason why the word should not be given the same meaning in the Transfer of Property Act.

Of the two Calcutta cases relied upon by the lower Courts, the one, Girindra Nath Mukerjee v. Bejoy Gopal Mukerjee, (1) does not apply, because in that case the bond was not attested by two witnesses; and the second case, Abdul Karim v. Salimun, (2) was decided on the authority of the first case.

There was no appearance on behalf of respondent.

CROWE, J.:—The important question arising in this case is whether the lower Court has misconstrued section 59 of the Transfer of Property Act. Both the lower Courts have relied on the ruling of the Calcutta High Court in Girindra Nath Mukerjee v. Bejoy Gopal Mukerjee (1) and Abdul Karim v. Salimun. (2)

Section 59 runs:

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Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

The mortgage-bond here sued upon is signed by the mortgagor and attested by three witnesses, and has been duly registered. The deed has been acted upon and the mortgagees have been put

in possession.

The case of Girindra Nath Mukerjee v. Bejoy Gopal Mukerjee (1) does not apply, as there the deed was not attested by two witnesses. In the case of Abdul Karim v. Salimun (2) their Lordships held that the attestation required by section 59 of the Transfer of Property Act is an attestation by witnesses of the execution of the document and not of the admission of execution. To that view we are unable to express our assent. There is nothing in the wording of the section to lead us to infer that such was the intention of the Legislature. Here the instrument is signed by the mortgagor and bears the attestations of three witnesses. Two of them are dead and the third, who has been examined in the case, states that Dayal Lakshmidas, the mortgagor, asked him to attest the mortgage-bond and admitted having signed it and having received the consideration. It has never been contended that the signatures are not genuine. If all the witnesses had been dead it would only have been necessary, in the absence of any allegation of fraud, to prove the signatures, and the Court would have acted on the maxim omnia præsumuntur rite esse acta. No objection was taken in the written statement to the validity of the deed and no issue was raised on the point. We may remark there is nothing to justify the inference that as the attestations of the deceased witnesses appear to have been written with a different ink they could not have witnessed the execution of the mortgage-bond.

It has been held by their Lordships of the Privy Council in a recent case (Gokul v. Pudmanund (3)) that "the essence of a Code is to be exhaustive on the matters in respect of which it declares

(1) (1898) 26 Cal. 246.

(2) (1899) 27 Cal. 190

(8) (1902) 29 Cal. 707.

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the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction." If section 50 of the Succession Act (X of 1865) be referred to, it will be seen that attestation by a person who signs a will in the presence of the testator after receiving from the testator a personal acknowledgment of his signature or mark is treated by the Legislature as attesting the will, and not as a mere attestation of the testator's admission of execution. The words used in the third paragraph of section 50 of the Succession Act are "The will shall be attested by two or more witnesses...., shall be necessary." And the words used in section 59 of the Transfer of Property Act are "by a registered instrument signed by the mortgagor and attested by at least two witnesses." It seems to us there is nothing in section 59 of Act IV of 1882 to warrant the conclusion that the word "attested" is used in this Act by the Legislature in a different sense from that in which it is used in section 50 of the Succession Act, and to read into the former section a provision that an attestation in the presence of the mortgagor by a person who has received from him a personal acknowledgment of his signature on the instrument of mortgage is not an attestation within the requirements of section 59 of the Transfer of Property Act is "to disregard or go outside the letter of the enactment." With due deference to the authority by which the case of Abdul Karim v. Salimun (1) was decided, we are of opinion that where a will under the provisions of the Succession Act is described by the Legislature as "attested" by witnesses who have signed it in the presence of the testator after having received from him a personal acknowledgment of his signature, an instrument of mortgage can equally be treated as attested under the provisions of section 59 o the Transfer of Property Act when the witnesses sign it in the presence of the mortgagor after having received from him a personal acknowledgment of his signature.

The mortgage-deed (Exhibit 15) which was held proved by the lower Courts was wrongly held to be invalid on the ground that the mortgagor who admitted his signature did not sign it in the presence of the attesting witnesses.

Ramji v. Bai Parvati. We vary the decree of the lower Appellate Court by ordering that on failure to pay the amount within two months the decreed debt, Rs. 182, be recovered by sale of the mortgaged property described in the plaint, and the balance, if any, from the estate of the deceased Dayal Lakshmidas. In other respects the decree of the lower Appellate Court is confirmed. The costs throughout will be borne by the respondent.

Decree varied.

APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Aston.

1902. October 15. DHANRAM RAGHO (ORIGINAL PLAINTIFF), APPELLANT, v. GANPAT SADASHIV AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), section 257A—Decree—Satisfaction of decree by a mortgage without sanction of Court—Mortgage bond void.

The plaintiff was the holder of a decree against the defendant for Rs. 2,370. On the 28th November, 1895, the plaintiff advanced to the defendant Rs. 59, and in consideration of this advance and of the amount already due by the defendant to the plaintiff under the decree, the defendant mortgaged certain property to the plaintiff. The mortgage bond provided for payment of interest on the mortgage debt at the rate of $10\frac{1}{2}$ per cent. per annum. The plaintiff subsequently sued on the mortgage to recover the principal and interest.

Held (dismissing the plaintiff's suit), that the mortgage was void under section 257A of the Civil Procedure Code (XIV of 1882), no sanction having been obtained.

Heera Nema v. Pestonji Dossabhoy (1) followed.

SECOND: appeal from the decision of Thakurdas Mathuradas, District Judge of Dhulia, confirming the decree passed by Ráo Sáheb K. R. Natu, Subordinate Judge at Yával.

The plaintiff was the holder of a decree against defendants for Rs. 2,370-7-3. On 28th November, 1895, the plaintiff advanced to the defendants a sum of Rs. 59-8-9, and in consideration of this advance and of the amount due by them on the decree, the defendants mortgaged certain property to the plaintiff. The mortgage

* Second Appeal No. 550 of 1901.
(1) (1898) 22 Boin. 693.

debt was made repayable with interest at the rate of 14 annas per cent. per mensem (i. e., 10½ per cent. per annum).

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The plaintiff now sued on the mortgage to recover the principal and Rs. 870 interest.

The defendants pleaded that the mortgage was void under section 257A of the Civil Procedure Code, having been made in satisfaction of a decree and without the sanction of the Court.

The Subordinate Judge dismissed the suit, relying upon the case of *Heera* v. *Pestonji*.⁽¹⁾

On appeal, the District Judge confirmed this decree on the following grounds:

The Subordinate Judge held on the authority of *Heera* v. *Pestonji* (I. L. R. 22 Bom. 693) that as the bond was taken without the sanction of the Court which passed the decrees above referred to, it was void under section 257A, Civil Procedure Code.

The plaintiff relies upon the case of *Tukaram* v. *Ananthhat* (I. L. R. 25 Bom. 252), a ruling passed since the disposal of this case by the Subordinate Judge, and urges that the mortgage bond is valid.

The defendants state that as the mortgage bond in suit is for the satisfaction of judgment-debts, and as it provides for the payment of a sum (in the form of interest from the date of the bond) in excess of the sums due under the decrees, it is void, since it was neither passed nor accepted with the sanction of the Court passing the decrees; and my attention is asked to Davlatsing v. Pandu (I. L. R. 9 Bom. 176). It is urged that the case of Davlatsing and the Full Bench ruling in the case of Heera govern this case, it being also pointed out that in the case of Tukaram there was no suggestion that the case fell within the second paragraph of the section, while in the present case the point is especially urged.

It must be considered that the bond provides for the payment of a larger sum of money than that due under the decrees, since it imposes upon the judgment-debtor the liability of paying interest at the rate of 14 annas per cent. per month, or Rs. 101 per cent. per annum.

I am of opinion, therefore, that the case falls within, and ought to be governed by, the Full Bench ruling in the case of *Heera* so long as that ruling stands. I am bound to follow it, especially as the authority of that ruling is affirmed by the High Court in the case of *Tukaram*.

Plaintiff appealed to the High Court.

Scott (Advocate General) (with C. A. Rele) for the appellant (plaintiff):—The mortgage bond is not void under section 257A of the Civil Procedure Code (Act XIV of 1882). It is not

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an agreement for the satisfaction of judgment-debt, but it is the actual and present satisfaction: Tukaram v. Ananthkat. (1) The section does not apply to agreements which operate to extinguish the decree. The decretal debt was converted by the mortgage into a secured debt, and an additional advance is also made. The decree was thus merged in the mortgage. The mortgage bond includes nothing more than the amount of the decree plus Rs. 59 paid in cash. The original rate of interest was 15 per cent. Per annum, while that in the mortgage bond is only $10\frac{1}{2}$ per cent. The rate in the bond is reasonable, and we are entitled to receive interest under the bond, although the decree did not provide for payment of interest till the date of the payment of the decretal amount. It cannot therefore be contended that this is an agreement to pay a sum which is in excess of the decretal amount.

The Full Bench case of *Heera Nema* v. *Pestonji Dossabhoy* (2) relied on by the lower Court is distinguishable. That was a suit brought on a promissory note, and not on a mortgage bond. The promissory note was renewed from time to time by adding interest to it as the same accrued due, and the rate of interest was 36 per cent. per annum, while in the present case it is only $10\frac{1}{2}$ per cent. We also rely on *Swamirao* v. *Kashinath* (3) and *Ghanasham* v. *Kashiram*.(4)

Vicaji (with him N. V. Gokhale) for respondents (defendants):—The mortgage bond is clearly an agreement to pay a sum in excess of the decretal debt, and the sanction of the Court not having been obtained, it falls within section 257A, clause 2, of the Civil Procedure Code (Act XIV of 1882). The case of Heera Nema v. Pestonji Dossabhoy (2) is on all fours with the present case: there is no difference between a promissory note and a mortgage bond given in extinguishment of the decretal debts. The authority of that decision has been affirmed in Tukaram v. Ananthhat. (1)

The decree in this case did not provide for the payment of interest, but the mortgage bond does. The mortgage is therefore

^{(1) (1900) 25} Bom. 252.

^{(2) (1898) 22} Bom. 693,

^{(3) (1890) 15} Bom. 419.

^{(4) (1891) 16} Bom. 589.

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in excess of the sum due under the decree. The case of Tukuram v. Ananthhat (1) is distinguishable. In that case there was no excess according to the finding of the lower Appellate Court, and the only question raised on the facts found was whether the mortgage bond was an agreement to give time for the satisfaction of the judgment-debt, under clause 1 of section 257A of the Civil Procedure Code (Act XIV of 1882). The Court had only to consider whether that clause applied or did not, while in the present case the question is whether section 257A, clause 2, applies.

CROWE, J.:—This is a suit to recover Rs. 3,300 due on a mortgage bond dated the 28th December, 1895. The contention of the defendant was that the mortgage deed was illegal under the provisions of section 257A of the Code of Civil Procedure. The Court of first instance held that objection good and rejected the claim. The lower Appellate Court on the same ground, after referring to the reported cases, confirmed the decree of the lower Court and rejected the appeal.

In the appeal before us the learned Advocate General has pleaded that the mortgage bond was not an agreement for the satisfaction of the judgment-debt within the terms of section 257A, and he has relied on the ruling of the learned Chief Justice in the case of Tukaram v. Ananthhat.(1) The present case can be distinguished from the case quoted above in one respect, namely, that in that case it was found that it was not an agreement to give time and that it did not provide for payment of any sum in excess of that due under the decree. In the course of his judgment the learned Chief Justice referred to the various decided cases and commented on them. In construing the case of Heera Nema v. Pestonji, (2) decided by a Full Bench of this Court, he remarked that in that case the agreement for the satisfaction of the judgment-debt in imposing a liability to pay 3 per cent. per mensem, or 36 per cent. per annum, as interest clearly provided for the payment of a sum in excess of the sum accrued due under the decree.

The Full Bench case of *Heera Nema* v. *Pestenji*⁽²⁾ has been relied on by the respondent; and we think that the present case can

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rightly be decided in accordance with the ruling of the Full Bench in that case. The amount due under the decree was a sum of Rs. 2,370-7-3. The mortgage deed shows that a further sum of Rs. 59-8-9 is alleged to have been paid in cash, and the bond is passed for the sum of Rs. 2,430, carrying interest at the rate of 14 annas per cent. per mensem. It seems to us, therefore, that this case is practically on all fours with the Full Bench case, and, therefore, we should follow that decision in holding that the agreement in this case does fall within the purview of paragraph 2 of section 257A, and that it is, therefore, void.

For these reasons we affirm the decree of the Court below, and reject the appeal with costs.

Decree confirmed.

ORIGINAL CIVIL.

Before Mr. Justice Russel.

1902. November 27. BOMANJI JAMSETJI MISTRI AND BAI NAWAJBAI, A MINOB, BY HER FATHER AND NEXT FRIEND, THE SAID BOMANJI MISTRI (PLAINTIFFS), 9. NUSSERWANJI RUSTOMJI MISTRI (DEFENDANT).*

Practice—Costs, security for—Civil Procedure Code (XIV of 1882), section 380—Two plaintiffs, father and daughter—Suit for damages for breach of promise to marry.

A Parsi father and daughter (plaintiffs 1 and 2) sued for Rs. 10,000 as damages for the defendant's breach of his promise to marry the daughter (plaintiff 2). The defendant alleged that the suit was really a suit for the benefit of the father, who sought to make money out of his daughter's betrothal: that he (the father) was an undischarged insolvent and not in a position to pay costs if he lost the suit, and that the second plaintiff (the daughter) had no property in India. The defendant took out a summons under section 380 of the Civil Procedure Code, requiring the plaintiffs to give security for costs. The Court ordered that security for costs should be given.

In Chambers. Summons taken out by defendant under section 380 of the Civil Procedure Code (XIV of 1882) calling on plaintiffs to give security for costs.

The first plaintiff was the father of the second plaintiff, who was a minor and sued by her father and next friend (the first plaintiff).

Bomanji v. Nusserwanji,

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The plaint claimed Rs. 10,000 as damages for the defendant's breach of his promise to marry the second plaintiff. It alleged that in 1899 the defendant requested the first plaintiff to give him the second plaintiff in marriage, and that, on the first plaintiff's agreeing to do so, the second plaintiff was betrothed to the defendant on the 3rd January, 1900. Subsequently the defendant broke off his engagement and in January, 1902, married another girl. The plaint continued:

8. By reason of the defendant's wilful breach of his contract to marry the second defendant both the plaintiffs have suffered much, both in mind and body, and their reputation has been considerably lowered amongst their friends and relatives. The plaintiffs have sustained damages by reason of the defendant's breach of his contract, which they assess at Rs. 10,000. The first plaintiff says that having regard to what has happened he will find it now very difficult to find a suitable husband in a good family for his daughter unless he is able to provide a handsome dowry for her. He says that he has no desire to profit by his daughter's misfortune, but is desirous of securing an adequate sum by way of damages from the defendant in order to provide a dowry for his daughter, and is willing that such sum as the Court may award as damages should enure for the benefit of the second plaintiff alone.

The plaint prayed for Rs. 10,000 as damages and for the return of certain presents made to the defendant at the betrothal.

In his written statement the defendant pleaded that it was the first plaintiff who in November, 1900, broke off the engagement and refused to permit the marriage to take place.

On the 29th September, 1902, the defendant took out this summons under section 380 of the Civil Procedure Code (XIV of 1882) calling on the plaintiffs to show cause why security for costs should not be given. In support of the summons it was alleged that, having regard to the statements in the 8th paragraph of the plaint, it was clear that, although filed ostensibly by the first plaintiff for himself and his daughter, this suit was really a suit on behalf of the first plaintiff (the father) alone; that the first plaintiff was an undischarged insolvent and was not in a position to pay the costs of the defendant if the suit was

Bomanji v. Nusserwanji. dismissed, and that the second plaintiff (the daughter) was not possessed of any immoveable property or any property in India.

In an affidavit filed by the first plaintiff he stated that his daughter (the second plaintiff) had no property of her own out of which security could be given.

Davar for the plaintiffs showed cause:—No security ought to be ordered in this case. Section 380 has no application here. There are two plaintiffs, one is a male and the other a female. The former sues in his own right for a return of the presents given to the defendant on betrothal. The latter sues for damages for breach of contract of marriage. No point is taken in the written statement as to misjoinder of parties or of causes of action. The fact that the male plaintiff is an undischarged insolvent or in poverty is no reason for requiring security for costs: Fellows v. Barrett(1); Rhodes v. Dawson(2); Cowell v. Taylor(3); Annual Practice (1903), page 902; Cook v. Whellock.(4)

The second plaintiff is a minor and sues by her next friend. Even if she were the sole plaintiff the section should not be enforced against her, being a minor: Bai Porebai v. Devji Meghji⁽⁵⁾; Degumbari Debi v. Aushootosh⁽⁶⁾; In the goods of Premchand.⁽⁷⁾ It cannot be said that this suit is improper or vexatious, so that there is no ground for exercising against the plaintiffs the discretion given by the section.

Scott (Advocate General) for the defendant in support of the summons:—Having regard to the circumstances of this case the order asked for should be made. The matter is in the discretion of the Judge: Bai Porebai v. Devji Meghji. (5) Here a father, who has no means whatsoever, is seeking to benefit by a claim made on behalf of his daughter. I rely upon the judgment of Bowen, L.J., in Cowell v. Taylor (3) where he says (page 38) "that, in order to prevent abuse, if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security."

^{(1) (1836) 1} Keen 119.

^{(2) (1886) 16} Q. B. D. 548,

^{(3) (1885) 31} Ch. D. 34.

^{(4) (1890) 24} Q. P. D. 658.

^{(5) (1898) 23} Bom. 100.

^{(6) (1890) 17} Cal. 610.

^{(7) (1894) 21} Cal. 832.

^{(8) (1885) 31} Ch. D. at p. 38.

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RUSSELL, J.:—I must make the summons absolute. Looking at the form of the plaint, I think the Advocate General's argument is well founded, that the first plaintiff is trying to make money out of his daughter's engagement. It appears to me that the first plaintiff is added merely to get over the difficulty as to security, if possible. The present case is clearly distinguishable from Bai Porebai v. Devji Meghji⁽¹⁾ and falls within the dictum of Bowen, L.J., in Cowell v. Taylor.⁽²⁾

The section vests a discretion in me, and, in my opinion, I must exercise it in favour of the defendant. I therefore order that the summons be made absolute. Plaintiff to deposit Rs. 400 as security within two months. In default, suit to be dismissed with costs. If the deposit be made, costs to be costs in the cause.

Attorneys for the plaintiffs—Messrs. Mulla and Mulla.

Attorneys for the defendant—Messrs. Smetham, Byrne and Noble.

(1) (1898) 23 Bom. 100.

(2) (1885) 31 Ch. D. at p. 38,

ORIGINAL CIVIL.

Before Mr. Justice Chandavarkar.

DE SILVA, PLAINTIFF, v. DE SILVA AND DEVKARAN NANJI, DEFENDANTS.*

1902. September 12.

Administrator—Sale of immoveable property by administrator of deceased person—Title—Succession Act (X of 1865), sections 179 and 269—Administrator of trustee—Title of assignee of administrator as against cestui que trust—Priority.

One Anna De Silva, a Christian inhabitant of Bombay, died intestate in May, 1893, leaving her surviving a minor son (the plaintiff), her husband (defendant 1) and a daughter who died in infancy. Previously to her death the deceased purported to purchase certain leasehold property situate in Bombay, the saleded of which was duly executed in her name. In August, 1893, her husband (defendant 1), being called upon to make good a large sum of money for which he was responsible as cashier of Messrs. Graham & Co. of Bombay, handed over

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the title-deeds of the said property to two representatives of the firm, viz., J. F. N. Graham and another, stating that his deceased wife Anna De Silva was merely a trustee of it, and that the beneficial interest was vested solely in him. On the 18th September, 1893, he executed a conveyance of the property to the said two representatives of Graham & Co. He was shortly afterwards convicted of criminal breach of trust at the prosecution of Graham & Co. On the 1st November, 1893, J. F. N. Graham obtained a limited grant of letters of administration to the estate of Anna De Silva, under section 221 of the Indian Succession Act (X of 1865). Subsequently Graham & Co. sold the property to the second defendant, the said J. F. N. Graham joining in the conveyance as administrator of Anna De Silva's estate. In 1902 the plaintiff, as son and heir of Anna De Silva, brought this suit, claiming to recover his share of the said property, alleging that it belonged absolutely to his mother. The second defendant (the purchaser from Graham & Co.) denied that it had belonged to Anna De Silva. He alleged that it really belonged to her husband (defendant 1), who had paid for it and for whom she was a trustee. He further contended that, in any event, he had a good title as against the plaintiff, having purchased from the administrator of Anna De Silva's estate.

Held, that, assuming that the property did belong to Anna De Silva, the second defendant had acquired an indefeasible title to it by virtue of the conveyance to him to which her administrator was a party. Her interest in it had vested in her administrator under section 179 of the Succession Act (X of 1865), and under section 269 he could dispose of it as he might think fit.

Held, also, that even if Anna De Silva held the property as trustee, the second defendant was entitled. The legal estate passed to her administrator, and he conveyed it to the second defendant, who also obtained the equitable estate when he received the title-deeds from Graham & Co. as assignees of the first defendant, who was one of the heirs of Anna De Silva and who asserted his own title to the whole property to the exclusion of the plaintiff. The second defendant's title was therefore complete, unless he could have detected the falsehood of the first defendant's claim by reasonable diligence, and there was nothing to show that he could.

THE plaintiff was the minor son of the first defendant and he claimed in this suit to recover a share in certain leasehold property consisting of land with a dwelling house thereon situate in Bombay, alleging a title by inheritance from his mother, one Anna E. De Silva, deceased.

The plaint alleged that the said Anna E. De Silva died intestate in Bombay on the 24th May, 1893, absolutely entitled to the said property, leaving as her only heirs and next of kin her minor son (the plaintiff), her husband (defendant 1) and one daughter Anita, who subsequently died in infancy.

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After the death of the said Anna E. De Silva, her husband, the first defendant, who was then in possession and enjoyment of the said property, sold it on the 8th September, 1893, to Messrs. W. and A. Graham & Co., by whom it was afterwards sold to the second defendant. At the date of the suit the second defendant was in possession as such purchaser.

In 1901 the plaintiff called upon the second defendant to come to a partition of the property and to hand over to him his share therein, but the second defendant had not done so.

The plaint further stated that the plaintiff by his guardian had applied for letters of administration to the estate and effects of the said Anna E. De Silva, which application was still pending.

The plaintiff prayed (a) for a declaration that the property in suit belonged to the estate of the said Anna De Silva, (b) that the property might be partitioned and the plaintiffs share ascertained and made over to him, (c) for an account, &c., &c.

The first defendant did not file any written statement.

The second defendant filed a written statement, in which he stated that the property in suit was conveyed to him for value by one J. F. N. Graham, the administrator of the said Anna E. De Silva, under letters of administration granted to him on the 13th September, 1894, "which letters were then and still are unrevoked," and that, assuming the statements in the plaint to be true, the plaintiff had no cause of action against him (defendant 2). He further stated that he did not admit that the said Anna E. De Silva had any beneficial interest in the said property; but that he believed that she was only the nominee of her husband (defendant 1), who had supplied the purchase money, and that this suit was filed at the instigation of the said first defendant.

It appeared at the hearing that the first defendant had married the said Anna E. De Silva in February, 1890, and that on the 24th March, 1893, she purported to purchase the property in question from one Valladares for Rs. 20,000, the conveyance thereof being in her name. She died, as above stated, on the 24th May, 1893, leaving her minor son (the plaintiff), an infant daughter (since deceased) and her husband (defendant 1) her surviving.

In August, 1893, the first defendant, who had been cashier to Messrs. Graham & Co. of Bombay for twenty-six years, was DE SILVA
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required to make good a large sum of money for which as such cashier he was responsible to the firm. He thereupon made over (inter alia) to two representatives of the firm, viz., J. F. N. Graham and another, the title-deeds of the said property, representing that his deceased wife, Anna E. De Silva, was merely trustee thereof, and that the beneficial interest was solely vested in him. On the 18th September, 1893, he executed a conveyance of the said property to the said two representatives of the firm.

In November, 1893, the first defendant applied for letters of administration to his deceased wife. His petition, however, was not proceeded with, because of his conviction in April, 1894, of the offence of criminal breach of trust.

On the 1st November, 1893, J. F. N. Graham applied for a limited grant of letters of administration to the estate of the said Anna E. De Silva, and they were granted to him.

Messrs. Graham & Co. subsequently sold the property in question to the second defendant, the said J. F. N. Graham joining in the conveyance as administrator of the estate of Anna E. De Silva.

The following issues were raised at the hearing:

- 1. Whether the plaintiff can maintain this suit.
- 2. Whether Anna E. De Silva was possessed of, or entitled to the property in suit.
- 3. Whether, in any event, the second defendant, as purchaser from the administrator of the said Anna E. De Silva, is not absolutely entitled to the said property.
- 4. Whether the representatives of Anita De Silva are necessary parties to the suit.
 - 5. General issue.

Baptista and Bhandarkar for plaintiffs. They cited Lopes v. Lopes (1); Kishen Koomar Moitro v. Stevenson (2); Snell's Principles of Equity, page 130.

Raikes and Lowndes for defendant 2. They cited Jones v. Powles⁽³⁾; Taylor v. Russell⁽⁴⁾; Williams on Real Property

^{(1) (1868) 5} B. H. C. R. 172 (O. C.)

^{(3) (1834) 3} My. & K. 581.

^{(2) (1865) 2} Cal. W. R. 141 (Civil Rul.)

^{(4) (1892)} Ap. Ca. 244.

(Ed. 1835), page 193; Succession Act (X of 1865), section 179; Evidence Act (I of 1872), section 41.

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CHANDAVARKAR, J.:—The first point in this case is a dry point of law and must, in my opinion, be disposed of in favour of the second defendant, Devkaran Nanji. It arises in this way.

One Anna De Silva was the wife of the first defendant, John Joseph De Silva. He married her in February, 1890, and on the 24th of March, 1893, she purported to purchase the immoveable property, which is the subject-matter of this suit, from one Valladares, for Rs. 20,000. The sale-deed (Exhibit A) was executed in her name. She died on the 24th of May, 1893, leaving an infant son, who is the plaintiff in the present suit, an infant daughter, and her husband, the first defendant.

About August, 1893, the first defendant, who had till then been cashier to Messrs. Graham & Co. for twenty-six years, was found short of moneys to a large amount belonging to the firm. Having been called upon to make good the amount, he agreed to make over to Messrs. Graham & Co. whatever property he had, and made over the title-deeds of the property in dispute to two of their representatives, Mr. John Frederick Noble Graham and another, representing that his deceased wife Anna was merely a trustee of the property and that the beneficial interest in it was vested solely in him. On the 18th of September, 1893, he executed a conveyance of the property in dispute in the names of the said two representatives of Messrs. Graham & Co. (Exhibit No. 2). On the 1st November, 1893, the first defendant applied to this Court on its Testamentary Side for letters of administration to the estate of his wife Anna, and in his affidavit, annexed to the petition, he swore that the property now in dispute belonged to him, and that Anna had held it merely as trustee (vide Exhibit No. 1). The petition was not, however, proceeded with on account of the conviction of the first defendant of the offence of criminal breach of trust.

On the 1st of November, 1893, Mr. John Frederick Noble Graham applied for a limited grant of letters of administration to the estate of Anna, and they were granted to him. Messrs. Graham & Co. sold the property to the second defendant, Mr. John Frederick Noble Graham joining in the conveyance as administrator of the estate of Anna.

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The plaintiff now sues to recover by petition his share of the property as son and one of the heirs of Anna, and his case is that the property absolutely belonged to her. Assuming it did, it appears to me that the second defendant has obtained an indefeasible title to it by virtue of the deed of conveyance in his favour from Messrs. Graham & Co., to which Anna's administrator was a party. It is true that letters of administration were granted to Mr. John Frederick Noble Graham limited to the property now in dispute as property of which she was described as the sole trustee, and in which the said Mr. Graham, as assignee of the first defendant, was represented as the person beneficially interested. But though it was a limited grant under section 221 of the Indian Succession Act, the administrator became, in virtue thereof, the legal representative of Anna for the purposes of her interest in the property, and such interest as she had in the property became vested in him as such legal representative under section 179 of the Act. Under section 191 the letters of administration entitled the administrator to all the rights belonging to the intestate, and under section 269 he had power to dispose of the property of the deceased in such manner as he might think fit. The administrator could not, indeed, confer any title which the intestate had not, but on the assumption in this case that Anna was not merely the trustee but was the absolute owner, the grant, though limited it was, enabled the administrator to confer on a purchaser all the rights she had in the property.

But it was argued by Mr. Baptista, the plaintiff's counsel, that the administrator joined in the conveyance to the second defendant not as representing the absolute title of Anna, but as representing her in an alleged trusteeship which never existed, and as representing in his own person as assignee of the first defendant the beneficial interest in the property, which the first defendant did not own. But the conveyance to the second defendant purported to pass to him all the right, title and interest which Anna had in the property, and the mere fact that the party so conveying it professed to act as administrator of her estate as trustee cannot cut down the legal effect of the conveyance or limit the right of the second defendant to the title wrongly alleged to have existed in Anna,

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if, as a matter of fact, she had a higher right. This view of the effect of the conveyance in favour of the second defendant is supported by the observation of Lord St. Leonards in *Drew v. The Earl of Norbury*, (1) where the Lord Chancellor said: "Nothing could be more mischievous or contrary to law than to hold that, when a party professes to convey all his estate and interest in particular lands, the operation of his conveyance should be limited to the estate which was vested in him in the character in which he purported to join in the conveyance."

The facts of this case appear to me to resemble very nearly those of Jones v. Powles(2) so as to bring it within the principle of equity enunciated by the Master of the Rolls in the latter case. In Jones v. Powles certain property had belonged to Jones, who had mortgaged it with possession. Jones died, having satisfied the mortgage, but without getting in the legal estate from the mortgagee. One Meredith asserted his title to the property as devisee under a forged will of Jones and induced the mortgagee to convey to him the legal estate. Meredith devised the property to his wife by his will, and the defendant in the case claimed as a bond fide purchaser under a purchaser from the wife of Meredith. The heir-at-law sued to recover possession from the defendant, but was non-suited on the ground that the latter was a bond fide purchaser, whose title was superior to that of the plaintiff because it was protected by the legal estate. The Master of the Rolls said in deciding the case (page 598): "The protection of the legal estate is to be extended not merely to cases in which the title of the purchaser for valuable consideration without notice is impeachable by reason of a secret act done, but also to cases in which it is impeached by reason of the falsehood of a fact of title asserted by the vendor or those under whom he claims, where such asserted title is clothed with possession and the falsehood of the fact asserted could not have been detected by reasonable diligence." Here, on the assumption that Anna De Silva was owner, on her death her husband (the first defendant) became one of her heirs. He asserted the title in himself to the exclusion of his son (the plaintiff), alleging that his wife had only been

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trustee. He made over the title-deeds to Messrs. Graham & Co. The latter could, no doubt, have found out that Anna had died leaving a son (the plaintiff) and a daughter; the conveyance from Valladares to Anna De Silva was also notice to them that presumptively the title stood in her name. Assuming that they were therefore not bond fide purchasers, we have, however, the fact that Mr. John Frederick Noble Graham took out letters of administration to the estate of Anna De Silva in her alleged character of trustee of the property. He was clothed with the legal estate, at any rate. The equitable title, upon the assumption on which I am now proceeding, vested in the heirs of Anna De Silva. Now as trustee, at any rate, of Anna De Silva's estate, Mr. John Frederick Noble Graham could act. "A trustee is a man who is the owner of the property and deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee and who are his cestuis que trust"; per James. L.J., in Smith v. Anderson.(1) The second defendant had the legal estate conveyed to him from Mr. Graham and he obtained the equitable title when he received the title-deeds from Messrs. Graham & Co. as assignees of John Joseph De Silva, one of the heirs of Anna De Silva. The second defendant's title was thus complete unless he could have detected the falsehood of the title asserted by John Joseph De Silva by reasonable diligence. is nothing to show that he could have so detected it.

On the merits also I think the plaintiff's case must fail. It is true that the conveyance from Valladares stood in the name of Anna De Silva, and that it was her hand which paid the purchase money. But the question is, whose was the purchase money and what was the intention of the purchase? The first defendant, John Joseph De Silva, admitted to Mr. Owen, Solicitor, in 1893, that the property belonged to him although the conveyance was made in his wife's name. In his petition for letters of administration to the estate of his wife, he made the same admission with reference to the property, and he repeated it in his affidavit annexed to the petition. The first

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defendant now states that he made the admission because of the pressure brought to bear upon him by Messrs. Graham & Co. at the time when he was charged by them with defalcations to a large amount and when they threatened to prosecute him if he did not make it good. There is no evidence to show that any pressure was brought to bear upon or any threat was administered to the first defendant for the purpose of getting him to admit that the property now in dispute belonged to him and not to his wife. Mr. Owen, on the other hand, states that at the interview which the first defendant had with him, the latter distinctly told him that the property belonged to him and that it had been bought with his money. Mr. Owen also states that no one from Messrs. Graham & Co. was present at the interview. It may be it is indeed probable that the first defendant expected that if he made good the amount of the defalcations Messrs. Graham & Co. might abstain from prosecution; but "any expectation that the defendant may have entertained, that, if he gave the required security, he might escape prosecution, will not of itself vitiate the transaction": per Maule, J., in Ward v. Lloyd. (1) The admission made by the first defendant to Mr. Owen and also in his petition for letters of administration must be taken as having been made by him of his own accord. But I will not, however, rely strongly upon it for the purposes of this case. I will take the evidence which he has now given as to his rights to the property as more important, and what does it come to? It only goes to corroborate the admission. He states that he gave to Anna all his first wife Margarita had on her death, ignoring the rights of the six children the latter had left. That property consisted of jewels worth Rs. 6,000 and Government paper worth Rs. 3,000; and he made over to her debts due to him from outsiders to the extent of Rs. 5,000. As to the Government paper he says: "The Government paper of Rs. 3,000 was originally mine, bought with my money and put in my first wife's name. In fact I found that paper after my first wife's death and it had been bought by her without my knowledge out of the savings of moneys I had given to her out

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of my salary. She used to make household expenses out of my salary and to save as much as she could out of it." As to the debts due from outsiders he says: "The demand receipts in respect of the debts due to me from outsiders were in the cupboard and I gave my second wife the keys. The receipts were in my name and she used to recover the moneys on my behalf." It is clear from this that, so far as the Government paper and the demand receipts were concerned, they were not assigned by the first defendant to his second wife Anna so as to make her the owner. They were moneys which belonged to him and she held them for him. As to the jewels worth Rs. 6,000, the first defendant says that there is nothing beyond his word to show that his first wife had left jewels. I can come to no other conclusion on this evidence than that Anna De Silva had no moneys of her own, but that the purchase of the property was out of the money belonging to the first defendant.

Anna De Silva's sister, Mrs. Anna Maria Boyes, who is the next friend suing on behalf of the plaintiff and who has been examined, has given evidence to the effect that Anna De Silva had jewels worth Rs. 10,000. Those jewels, she says, belonged to her elder sister Margarita, who was the first defendant's first wife. being presents from relations and friends, and she before her death transferred them to Anna De Silva. I cannot believe that, assuming that Anna De Silva had jewels worth Rs. 10,000 when she married the first defendant in February, 1890, they were sold for the purpose of purchasing the property now in dispute. The property was purchased for Rs. 20,000 from Valladares and there is nothing to show that Anna De Silva had moneys of her own to that amount to pay for it. The property was bought in her name out of moneys advanced by her husband, the first defendant, in March, 1893, just about the time when he had been misappropriating moneys belonging to Messrs. Graham & Co.

Mr. Baptista has raised the question of advancement, but apart from the question whether the doctrine of advancement applies to the Portuguese in Bombay, neither the plaint nor the issues raised the question distinctly. Besides, the doctrine of advancement applies where the husband buys in the name of

the wife. But here the wife purchased property in her own name out of her husband's money, and even if there were any presumption of advancement, it is rebutted by the evidence in, and circumstances of the case.

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I find in the affirmative on the first issue; in the negative on the second; in the second defendant's favour on the third; in the negative on the fourth and fifth. I reject the claim. The second defendant to recover his costs from both the next friend of the plaintiff and the first defendant, because, in my opinion, the first defendant is the real mover of this litigation.

Suit dismissed.

Attorneys for plaintiff-Messrs. Sorabji and Jehangir.

Attorneys for defendants—Messrs. Mansukhlal, Jamsetji and Hiralal.

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Batty.

IN THE MATTER OF THE BOMBAY BURMAH TRADING CORPORATION, LIMITED.

1902. October 17.

Company—Articles of Association—General meeting of shareholders— Proxies—Qualification of proxy—Memorandum of Association—Alteration of Memorandum of Association—Act XII of 1895.

The right of a shareholder to vote by proxy depends on the contract between himself and his co-shareholders, and where parties have a right depending on the contract between them and other parties, then all the requisitions of the contract as to the exercise of that right must be followed.

Article 65 of the Articles of Association of the Bombay Burmah Trading Corporation, Limited, provided as follows: "No person shall be appointed or have authority to act as a proxy who is not a shareholder in the Company."

Held, that the above article imposed two essential conditions, viz., that the proxy should be a shareholder at the date of his appointment and also at the date when he acted.

By a power-of-attorney dated 14th October, 1881, some of the shareholders in the above Company authorized and appointed certain specified persons "and all persons who at any time during the continuance of these powers-of-attorney may be partners in the firm of Messrs. Wallace & Co., of Bombay, however that firm may be constituted.......and in the absence from Bombay" of all the said persons, "then the person or persons for the time being holding the

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procuration of the said firm, and managing the said business jointly and each of them severally" to vote as proxy for them at meetings of the above Company. On the 20th March, 1889, M. became a shareholder in the Company, and on the 1st April, 1889, he began to manage the business of Wallace & Co., holding its procuration. Under the above power he voted as proxy at meetings of the Company held in 1902 for the purpose of altering the Memorandum of Association.

Held, that, not having been a shareholder at the date of his appointment as required by article 65, he had not been validly appointed a proxy.

It is not necessary that the actual name of the person appointed to be proxy should appear in the proxy paper. It suffices if he is designated by a description which fixes his identity at the date of appointment.

PETITION for the confirmation of a special resolution of the Company effecting an alteration in the Memorandum of Association under the Indian Companies (Memorandum of Association) Act (XII of 1895).

The Bombay Burmah Trading Corporation, Limited, was incorporated on the 4th September, 1863, under the Indian Companies Act (XIX of 1857). Its name then was "The Burmah Trading Company," but that name was afterwards altered by resolution dated the 30th April, 1864.

The registered office of the Company was situate in Bombay. In 1896 the Memorandum of Association was altered with the sanction of the Court, and the third clause thereof as then framed ran as follows:

3. The objects for which the Company is established are:

By and through the means of Messrs. Wallace & Co. of Bombay, Merchants, who shall at their option be the perpetual Secretaries, Treasurers and Managers of the Company, of whatever member or members that firm may for the time being consist, or by or through the means of other the Secretaries, Treasurers and Managers for the time being of this Company, to carry on trade with and at Burmah, Siam, Cochin-China, India, the Malay or Eastern Archipelago, Japan, Hongkong, and the Chinese Treaty Ports, but especially the timber and petroleum trades in all their branches, including treating and preparing for the market, and for the purposes aforesaid to purchase or take on lease and work forests or tracts of timber and to purchase or take on lease, hire or otherwise acquire or construct land, mills, buildings, easements, oil-fields, concessions, property and rights of all kinds, and to work, plant, develop, sell or otherwise turn the same to account, and also to purchase or otherwise acquire or construct manufactories for the purposes of the Company's oil business only, also to charter, purchase or construct ships and boats for the conveyance of the Company's goods or merchandise, to purchase timber, the product of any of the

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countries aforesaid, from other shippers or holders of the same either on account of the Company itself or on joint account with such shippers or holders, also to earry on the business of Commission Agents without advance, and to enter into any arrangement for sharing profits or for joint adventure, co-operation, or partnership in the Company's timber trade with any person, partnership or company carrying on or engaged in or about to carry on or engage in any business or transaction in timber, which this Company is authorised to earry on or engage in, and to form and establish Joint Stock Companies or partnerships for the purpose only of carrying on partly or wholly the petroleum trade of the Company, and to take or otherwise acquire and hold any fully paid up shares, stocks or securities of such companies or partnerships, and generally to do all such things as are incidental or conducive to the attainment of the above objects.

In 1902 it was proposed that the above clause should be deleted and the following objects clause substituted for it:

The objects for which the Company is established are:

By and through the means of Messrs. Wallace & Co., of Bombay, Merchants. who shall at their option be the perpetual Secretaries, Treasurers and Managers of the Company, of whatever member or members that firm may for the time being consist, or by or through the means of other the Secretaries, Treasurers and Managers for the time being to carry on trade and business with and at Burmah and the rest of India and the East, and in particular to buy, sell, get, produce, prepare for market, manufacture, import, export and deal in any part of the world in timber, oil, minerals and other products of Burmah, India and the East, and to purchase, construct, take on lease or otherwise acquire and to work. develop, plant or otherwise turn to account land, mines, mills, manufactories, buildings, easements, ships and boats, concessions,, business and property and rights of all kinds, and to carry out all or any such objects either on account of the Company itself or on commission or otherwise on behalf of any person or association of persons or Company, and to enter into any arrangement for sharing profits, joint adventure or co-operation or partnership with and to assist any person, partnership or company carrying on or engaged in or about to carry on or engage in any business or transaction which this Company is authorised to carry on or engage in, or any business or transaction capable of being conducted so as directly or indirectly to benefit this Company, and to take or otherwise acquire and hold shares or stocks in or securities of and to form and establish any such company or partnership or business, and to sell, improve, manage, develop, exchange, lease, mortgage, charge, dispose of, turn to account or otherwise deal with all or any of the property and rights of the Company for the time being, and to do all such other things as are incidental or conducive to the attainment of the above objects.

At an extraordinary general meeting of the shareholders held at the registered office on the 29th May, 1902, a special resolution to the above effect was proposed and seconded, but on

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being put to the meeting, the Chairman declared it lost on a show of hands.

A poll was thereupon demanded, and on being taken there were 872 votes in favour of the resolution and 223 against. The Chairman thereupon declared the resolution carried.

At a second extraordinary general meeting of the share-holders held on the 19th June, 1902, the above resolution was submitted for confirmation as a special resolution, and on a poll being taken it was carried, the voting being 844 in favour of the resolution and 301 against it. The greater number of votes were given by proxy.

The Company subsequently presented a petition to the High Court, setting forth the nature and objects of the proposed alteration of the Memorandum of Association, and praying that the said special resolution should be confirmed pursuant to the Indian Companies (Memorandum of Association) Act (XII of 1895).

It appeared that the Chairman of the meeting (Mr. R. H. Macaulay) recorded 316 votes in favour of the resolution as proxy for absent shareholders. The instrument under which he acted was a power-of-attorney dated the 14th October, 1881, and was as follows:

At the date of the above instrument Mr. Macaulay was not a shareholder in the Company, nor did he at that time manage the business or hold the procuration of the firm of Wallace & Co., Bombay. He first became a shareholder in the Company on the 20th March, 1889, and he became empowered to sign for the firm on the 1st April, 1889.

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The following were the Articles of Association of the Company relating to votes by proxy:

- 62. Votes may be given either personally or by proxy.
- 63. The instrument appointing proxy shall be in writing, under the hand of the appointor, or, if such appointor is a corporation, under their common seal, and shall be attested by one or more witnesses.
- 64. Every instrument appointing a proxy may be in the following form, or as nearly therein as may be:

Signed by the said in the presence of

- 65. No person shall be appointed or have authority to act as a proxy who is not a shareholder in the Company.
- 66. No person shall be allowed to vote or act as a proxy at any meeting unless the instrument appointing him shall have been deposited at the registered office of the Company not less than forty-eight hours before the time for holding the meeting at which the person named in such instrument proposes to vote.
- 67. Unless the instrument appointing the proxy shall otherwise indicate, the proxy thereby appointed shall be deemed to be a continuing proxy and shall be entitled to act as such until his appointment shall be revoked by instrument in writing deposited at the registered office of the Company.

Lowndes, Bayley and Young for the Company.

Branson for the opponents.

The following authorities were cited:—In re Parrott: Exparte Cullen(1); Seal v. Claridge(2); Harben v. Phillips(3); Tofaluddi v. Mahar Ali(4); Exparte Enans: In re Baum(5); Seale Hayne v. Jodrell(6); Bromley v. Wright(7); Forester v. New Land Diamond Mines.(8)

- (1) (1891) 2 Q. B. 151.
- (2. (1881) 7 Q. B. D. 516.
- (3) (1883) 23 Ch. D. 14.
- (4) (1898) 26 Cal. 78,
- в 1258-2

- (5) (1880) 13 Ch. D. 424.
- (6) (1891) Ap. Ca. 304 at p. 306.
- (7) (1849) 7 Hare 334, 340.
- (8) (1902) 18 Times Law Rep. 497.

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Jenkins, C.J.:—The Burmah Trading Corporation, Limited, has presented a petition to this Court under the Indian Companies (Memorandum of Association) Act, 1895, asking that an alteration in its Memorandum of Association, effected by special resolution, may be confirmed by the Court. As the learned Judge, to whom this class of business is ordinarily assigned, is disqualified by interest from dealing with the petition, its hearing has been transferred to the present Bench.

The petition is opposed both on its merits, and on the ground that the special resolution has not been passed according to law. Before the case can be dealt with on its merits considerable amplification of the evidence appears to us necessary, and though we are prepared to give the parties an opportunity under the circumstances to remedy this defect, we have been asked in the first place to deal with the respondent's objection to the validity of the resolution. This accordingly we now propose to do.

Though many objections are formulated in the respondent's affidavit, before us they have been narrowed to three, and to these I will limit my remarks. To understand them a few facts must be stated.

The resolution was first submitted to a meeting of the Company on the 29th of May, 1902, and, according to the report of the scrutineers, the resolution was passed by the requisite majority. Of these 844 votes, two lots, amounting to 124 and 192, which for the purposes of this case may be conveniently classed together, were recorded, if at all, by Mr. Macaulay, the Chairman of the meeting, as proxy for absent shareholders. It is conceded on both sides that, if those votes are to be counted, the resolution was passed, but that, if they are not, then it was lost.

The arguments consequently have been limited to a discussion on the validity of these votes.

Now, the first argument urged against them is that they in fact were never recorded. Though there may have been an absence of formality, I think there is no doubt that Mr. Macaulay intended to vote, and in fact did vote, as a proxy: the proxy papers, under which he purported to act, were placed in

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the basket appropriated to the votes in favour of the resolution: the proxy papers in opposition to the resolution were placed in another basket: and the scrutineers in the presence of Mr. Shroff, who practically was the representative of the dissentients, treated the votes represented by the proxy papers as properly given, without any protest. Had objection been taken at the time, any want of formality might have been, and doubtless would have been, remedied, and it would not under these circumstances be right to treat the votes as not actually given. The articles impose no particular procedure, and the course followed was, in my opinion, sufficient for the purpose of the poll then being taken. Therefore, this objection cannot prevail.

Then it is said that the proxy papers were not properly attested, but this objection only applies to 124 of the votes which were attested by Mr. Wallace. The 63rd of the Company's Articles of Association provides that the instrument appointing a proxy shall be attested by one or more witness or witnesses, and it is argued that this provision has not been observed, on the ground that Mr. Wallace was incompetent to attest, inasmuch as he was by the document appointed a proxy: In re Parrott. (1)

But to this it is answered, that one attesting witness suffices, and that this requirement has been observed, because, even if Mr. Wallace's attestation was invalid, there has been a good attestation by Mr. Doggett. In my opinion this is a good answer, for Mr. Doggett was none the less an attesting witness because he also was a certifying notary, and reading his notarial attestation I think the proxy paper was attested by him within the meaning of Article 63.

This brings me to the far more serious question, whether Mr. Macaulay's appointment as a proxy was in compliance with the Articles of Association. We have to be satisfied on this point, for, as stated in *Harben* v. *Phillips*, (2) the right of a shareholder to vote by proxy depends on the contract between himself and his co-shareholders, and where parties have a right depending upon the contract between them and other parties, there all the requisitions of the contract as to the exercise of that right must be followed.

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Now the objections urged under this head are, that there is no such proxy paper as the articles require, and that Mr. Macaulay had not the requisite qualification for his appointment. The force of these objections must be determined by Articles 62 to 67, which for this purpose must be read together. I am not prepared to say, notwithstanding the phraseology of Article 66, that the actual name of the appointed must appear in the proxy paper: I think it would suffice if he were designated by a description, which would fix his identity at the date of the appointment. But we have far more to reckon with here. Article 65 imposes two conditions: the proxy must be a shareholder at the date of his appointment and at the date when he acts. That both these conditions are essential is, I think, made the more apparent when the language of the article is contrasted with that of clause 44 of Table B to Act XIX of 1857. At the time of his voting Mr. Macaulay was a shareholder: the question is whether the other condition of the article has been satisfied.

Then again the instrument under which Mr. Macaulay purports to have acted is not in the form expressly sanctioned by the Articles of Association: it is a power-of-attorney, not limited to an authority to vote, but providing for a variety of other matters. So far as it relates to the power to vote it runs as follows:

The instrument is dated the 14th day of October, 1881.

Now it will be seen that Mr. Macaulay was not appointed by name: had he been, his appointment would certainly have been bad, for at the date of the instrument he was not a shareholder. It is stated before us that he first became a shareholder on the 20th of March, 1889, and that he first came within the descriptions contained in the power of attorney on the 1st of April following; for it was not until then that he held the procuration of the firm and managed the business in the absence of all partners of the firm from Bombay. Therefore, it is argued, the article is satisfied, for when the power-of-attorney came into operation as to him, he was a shareholder.

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But the article prescribes the qualification at the time when the appointment is made, not at any subsequent date to which the operation of the instrument may be postponed, and an appointment is none the less made at its date because its operation is suspended. The appointment is of all persons answering a particular description, irrespective of the qualification the article imposes, and there is nothing in the articles, nor has it been suggested that there is elsewhere, a provision, as a result of which the possession of shares in the Company is an inseparable incident of the description contained in the power.

Can it then be said that the requisitions of the articles have been observed? Read together they appear to me to contemplate the appointment of no one but ascertained individuals holding the prescribed qualification at the date of the instrument, and not an appointment such as we have here, whereby a number of persons, some ascertained and some not, some at the time qualified and some not, are vested with authority to vote, without any exhaustive attempt at selection between them, and without any limit as to time except the continuance of the firm of Wallace & Co., howsoever that firm may at any time be constituted.

No practical difficulty has arisen in this case, but it is easy to see that the Company might be seriously embarrassed if an instrument like the present were treated as a compliance with its article; for if good for one it would be good for all. Under the power several persons are expressed to be vested with authority to vote at one and the same time, and in some cases without indication of preference, so it is manifest that if there were a difference of view among the several would-be proxies, and each claimed to vote, serious difficulties would arise, and the Company might be thereby hampered in the conduct of its affairs.

I think, therefore, the instrument does not comply with the Company's articles, and further that Mr. Macaulay, for want of

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proper qualification, has not been validly appointed a proxy, and as a result I hold that the resolution has not been passed by the requisite majority. The objection of insufficient stamping has not been pressed before us, for under the Indian Stamp Act the votes would not on that ground be void.

The result, however, is that the petition must be dismissed with costs, but we can only allow Mr. Shroff half his costs of the first affidavit, as it appears to us needlessly prolix.

BATTY, J.:—Inasmuch as the right to vote by proxy is not a right claimable under the ordinary law, but is derived from the terms of the "Articles of Association," it is essential that the conditions imposed by those articles should be strictly fulfilled.

Article 65 runs as follows: "No person shall be appointed or have authority to act as a proxy who is not a shareholder in the Company."

This, in its plain grammatical meaning, seems to require that the prescribed qualification must exist both at the time—when the appointment is made and also at the time when the authority to act under it is exercised. Such a construction would, of course, be fatal to an appointment in future of a person not qualified in presenti.

The alternative suggested is that if a person, not a shareholder at the date of the instrument appointing him, becomes a shareholder at the moment when that instrument, so far as he is concerned, comes into operation, there is a substantial compliance with the rule. That construction would in effect substitute for the words "no person shall be appointed" the words "no person appointed shall have authority to act as a proxy." It assumes an intention not expressed in the article or arising by necessary implication from the circumstances. If it were correct, the words "shall have authority to act as proxy" would have sufficed. The words "no person shall be appointed" would then be redundant and unmeaning. But there is nothing to justify the assumption that those words were retained per incuriam. For the article was advisedly adopted in lieu of the model supplied by the Legislature in No. 44 of Schedule B to the Act (XIX of 1857) then in force. And there is no apparent reason for supposing that the requirement relating to the appointment, was

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deemed less essential than the requirement relating to the exercise of the authority thereby conferred. To hold, therefore, that the real intention was only to insist on the prescribed qualification when the appointment came into operation, is not justified by the plain meaning of the words used. The circumstances in which the articles were drafted would, if it be permissible in such case to speculate as to the intention, induce the contrary conclusion. For the articles were prepared to exclude and replace those in the Schedule B to the Act which would otherwise have applied. It would seem, therefore, legitimate to infer that those who framed the articles had that schedule under consideration and intended to express all deviations from its essential principles with precision. No. 44 of the schedule expressly provides that no instrument appointing a proxy shall be valid after the expiration of one month from the date of its execution. This time limit was discarded. But no further departure from No. 44 was allowed, and article 65 deliberately retained the provision restricting the selection of proxies to shareholders in esse at time of the appointment, precluding appointments of suspended validity.

But even if the articles be read apart from all extrinsic indications as to intention, is it possible, in applying the strict principle of construction followed in Harben v. Phillips, (1) to infer that it was the intention in article 64 and article 65 to authorise the appointment of a person who did not possess the prescribed qualifications till nearly ten years after the date of the instrument appointing him? To construe those articles with such latitude would be to deprive the terms of the agreement binding on the shareholders of all certainty. If a meaning so remote from that which is expressed could be imported into the articles, it would, I think, tend to destroy the confidence which the shareholders of companies are entitled to place in the binding force of "Articles of Association."

Petition dismissed.

Attorneys for the petitioner—Messrs. Craigie, Lynch & Owen.

Attorneys for the opponents—Messrs. Ardeshir, Hormasji,

Dinshaw & Co.

(1) (1883) 23 Ch. D. 14.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1902, November 11, SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), APPLICANT, v. JANARDAN GANPATRAO (ORIGINAL PLAINTIFF), OPFONENT.*

Privy Council—Appeal to Privy Council—Appeal dismissed for want of prosecution—Costs—Order made by the High Court that the appellant should pay the respondent's costs of application for leave to appeal.

Where an appeal to the Privy Council was dismissed for want of prosecution, the High Court ordered the appellant to pay the respondent's costs of the application for leave to appeal.

Milson v. Carter(1) followed.

APPLICATION for costs in the matter of the appellant's application for leave to appeal to the Privy Council.

On the 22nd April, 1892, the first Court's decree dismissing this suit against the Secretary of State was confirmed by the High Court in appeal.

The plaintiff, thereupon, applied for leave to appeal to the Privy Council, and the Court (Sargent, C.J., and Candy, J.) granted a rule nisi, calling on the defendant to show cause why leave should not be granted. The rule was argued before Sargent, C.J., and Telang, J., who, on the 13th February, 1893, made the rule absolute and gave the plaintiff leave to appeal. Their order was as follows:

Rule made absolute and certificate granted under section 600, Civil Procedure Code. Costs of the application to be costs in the appeal.

The plaintiff duly filed his appeal to the Privy Council, but his appeal was dismissed for want of prosecution. The defendant thereupon applied to the High Court (1) that his (defendant's) costs might be taxed and a formal decree be passed directing the plaintiff to pay the same; (2) that in the event of the Court's order of the 13th February, 1893, being considered insufficient in its terms to justify the grant of the above prayer, the said order may be corrected so as to include in it the case of an appeal

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"dismissed without further order" under Rule V of the Order in Council of the 13th June, 1853, and then the prayer contained in clause (1) above be granted; and (3) that such other and further relief be granted as may seem meet.

A rule nisi was granted calling on the plaintiff to show cause why the above application should not be granted.

Ráo Bahádur Vasudeo J. Kirtikar (Government Pleader) appeared for the applicant (defendant) in support of the rule He relied on Milson v. Carter. (2)

There was no appearance for the opponent (plaintiff).

CHANDAVARKAR, J.:—The order passed by Sir Charles Sargent and Mr. Justice Telang, giving leave to the appellant to appeal to the Privy Council, says that costs should follow the appeal. The Privy Council having dismissed the appeal for want of prosecution, we must, following the authority which the learned Government Pleader cited, viz., Milson v. Carter, (2) correct the order and make the rule absolute with costs.

The costs claimed by Government are allowed after deducting one anna for the stamp on the application for copies, which item is not admissible.

Rule made absolute.

(1) Rule V of the Order in Council of the 13th June, 1853, runs:

V.—That a certain time be fixed within which it shall be the duty of the appellant or his agent to make such applications for the printing of the transcript and that such time be within the space of six calendar months from the arrival of the transcript and the registration thereof in all matters brought by appeal from Her Majesty's colonies and plantations east of the Cape of Good Hope or from the territories of the East India Company, and within the space of three months in all matters brought by appeal from any other part of Her Majesty's dominions abroad; and that in default of the appealant or his agent taking effectual steps for the prosecution of the appeal within such time or times respectively, the appeal shall stand dismissed without further order, and that a report of the same be made to the Judicial Committee by the Registrar of the Privy Council at their Lordships' next sitting.

APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Aston.

1902. November 12. MALKARJUN SHIDAPA (ORIGINAL PLAINTIFF), APPELLANT, v. THE SOUTHERN MARATHA RAILWAY COMPANY (ORIGINAL DEFENDANTS), RESPONDENTS.*

Railway Company—Carriage of goods—Contract—Formation of contract— Rules of Company for consignment of goods—Re-booking of goods after arrival at original destination—Instructions to station master to re-book.

The rules of a Railway Company prescribed certain procedure for the booking of goods. In accordance with those rules certain goods were booked from Trichinopoly to Bágalkot. The plaintiff requested A., the goods clerk and station master at Hotgi (on defendants' Railway), to have the goods re-booked from Bágalkot to Hotgi, and for this purpose handed him the railway receipt with a written application, which, however, was not in the form of consignment used by the Company. A. accordingly sent a service telegram to the station master at Bágalkot asking him to re-book the goods. The station master there did not re-book the goods and they were delivered at Bágalkot. The plaintiff sued the Railway Company for damages for non-delivery at Hotgi.

Held, that the defendant Company had not contracted with the plaintiff to carry the goods from Bágalkot to Hotgi. The mere fact that the plaintiff got A., the station master at Hotgi, to send a service telegram to Bágalkot did not constitute a contract to bind the Company.

APPEAL from E. M. Pratt, District Judge of Sholápur, confirming the decree passed by Ráo Sáheb Mahadev Shridhar, First Class Subordinate Judge of Sholápur.

Suit to recover damages for non-delivery of goods.

The plaintiff sued the defendant Company to recover as damages for non-delivery the sum of Rs. 813-12-0, being the price of 15,500 cocoanuts which his agent at Trichinopoly consigned to him at Bágalkot on the Southern Maratha Railway on the 26th February, 1898. The railway receipt was of that date.

On the 1st or 2nd March, 1898, the plaintiff requested the goods clerk, who was also acting as station master at Hotgi (on the defendants' Railway), to have the consignment re-booked from Bágalkot to Hotgi, and for that purpose handed him a

^{*} Second Appeal No. 340 of 1901.

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written application to that effect, which was not in the form of consignment note in use by the Company. On the 2nd March the goods clerk at Hotgi sent a service telegram to the station master at Bágalkot, asking him to re-book the consignment. On the 6th March the station master at Bágalkot in reply stated that the goods had been delivered to one Bhimapa.

The plaintiff complained that the station master at Bágalkot did not forward the goods to Hotgi, and that, therefore, the plaintiff did not receive them. He gave notice of his claim to the Company on the 22nd March and 23rd April, 1898, and now sued to recover the above sum as damages, being the market rate of the goods at the date at which the goods ought to have been received.

The defendants pleaded that the original contract for carriage of the goods from Trichinopoly to Bágalkot had been duly performed, and that there was no valid contract for their further conveyance from Bágalkot to Hotgi; that the Hotgi goods clerk had no authority to contract for the re-booking, &c.

The Court of first instance dismissed the suit, holding that there had been no contract effected between the plaintiff and the defendants for the re-booking of the goods. In his judgment the Subordinate Judge said:

The question now is whether the telegram of the Hotgi goods clerk of the 2nd March, 1898, was sufficient to render the contract complete and binding on the defendants to carry the goods from Bágalkot, when they arrived, to Hotgi, and deliver them to the plaintiff there. The Company's rule requires that the sender of goods, when delivering them for despatch, must sign a consignment note in the prescribed form containing a declaration of the weight, description and place of destination of the goods consigned. On delivering the goods to the Company with the consignment note duly signed and filled in he receives a receipt, and then the contract to convey the goods to the place of destination mentioned is complete. There is no separate provision for re-booking, because it appears to me that such a provision is thought unnecessary. Goods once booked and despatched must arrive at their place of destination. If the consignee desires to have them carried further on to another station, there must be a fresh contract, a fresh consignment note given to the Company, and a fresh receipt obtained from them. There may not be a formal and actual delivery to the consignee; there may not be unleading and re-loading, at least where there is no objection to send the goods in the same wagon or vehicle; but there must be a contract duly made for the further conveyance of the goods,

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and such a contract can, under the Company's rules, only be effected by a consignment note signed by the original consignor or consignee. There is thus no difference between booking and re-booking, and that seems to me to account for the absence of any specific rule in connection with re-booking of goods.

It may be asked why goods are not booked through. The question was once raised by the Hotgi goods clerk, who pointed out in his reference to the Traffic Manager that the charges from Trichinopoly for booking goods direct to Hotgi are greater than the charges from Trichinopoly for booking to Bijápur and thence to Hotgi (vide Exhibit 125). The charges for through booking are still greater than the charges for booking first to Bágalkot and thence to Hotgi. The Traffic Manager did not allow through charges, but only charges from Bijápur to Hotgi, but he directed that the goods must be unloaded and re-loaded at the Bijápur Station (Exhibit 126). Goods booked from Trichinopoly must come in a wagon of the S. I. R. Company, and the wagon cannot be sent on but must be returned within a specified time; such a wagon must be emptied, and hence the Traffic Manager's direction to the Bijápur Station for unloading and re-loading.

Thus the plaintiff's motive in desiring the goods to be re-booked from Bigalkot and brought to Hotgi is easily seen. But in order to secure that object it was his duty to hand over to the Bagalkot station master the goods receipt and then apply to him to book the goods to Hotgi under a new consignment note. The handing over the goods receipt which he had received from Trichinopoly would have nominally amounted to a delivery, and the contract to carry the goods from Trichinopoly to Bagalkot would have been completely performed on both sides before a new contract to carry the goods further on from Bágalkot to Hotgi was entered into. There are witnesses Nos. 36, 62, 79, 110, 111, and 112 examined on behalf of the defendant on this point. All these witnesses, who are goods clerks, station masters and traffic inspectors of long standing in the employ of the defendant Company, state that there is virtually no difference between booking and re-booking of goods, and that the Company's rule which governs the booking must govern the re-booking. Even the Hotgi goods clerk (Exhibit 63) admits that a consignee wanting goods to be re-booked must, as a rule, produce the railway receipt and apply to the station master of the station where the goods have arrived or are destined to arrive.

In appeal the lower Court's decree was confirmed. In his judgment the Judge said:

The Company's contract with the plaintiff was to carry his goods to Bágalkot and deliver them there. The contract is not the subject of this suit. Plaintiff does not allege that he was refused delivery of the goods at Bágalkot. His complaint is that he wished them to be re-booked to Hotgi, and that they were not so re-booked. In his plaint he alleged that the station master and

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goods clerk at Hotgi agreed to deliver the goods to him at Hotgi, and that the goods were not delivered in pursuance of this agreement by reason of a neglect of duty on the part of the station master at Bágalkot. The suit, therefore, is for breach of a subsequent contract entered into by the Company through their servant, the station master at Hotgi, to carry the goods from Bágalkot to Hotgi. It is clear, however, from the evidence of the Hotgi station master that he could not, and did not, enter into any such agreement. Mr. Kirloskar admits that he cannot contend that any contract was entered into between the plaintiff and the Hotgi station master. The plaintiff has, therefore, no cause of action. The obligation to carry the goods to Hotgi can only arise ex contractu. If the Company did not contract or did not agree to re-book, they cannot be liable.

The plaintiff appealed to the High Court.

G. S. Mulgaonkar for the appellant (plaintiff).

Kirkpatrick (with Crawford, Brown & Co.) for respondents (defendants). Slim v. Great Northern Railway Company (1) was referred to.

CROWE, J.:—It seems quite clear to us that the mere fact, that the plaintiff got the Hotgi station master to send a service telegram to Bágalkot to re-book the goods from Bágalkot to Hotgi, cannot possibly constitute a valid contract which would bind the Company, and the decision of the lower Appellate Court is perfectly correct.

We must, therefore, confirm the decree and reject the appeal with costs.

Decree confirmed.

(1 (1854) 14 C. B. 647.

CRIMINAL REVISION.

Before Mr. Justice Crowe and Mr. Justice Aston.

IN THE MATTER OF GOVERDHANDAS MEGHJI.*-

1902. November 27.

Small Cause Court—Registrar of Small Cause Court—Sanction to prosecute granted by Registrar—Revocation of sanction—Chief Judge can revoke it as a public officer—Jurisdiction of Small Cause Court to revoke the sanction—Presidency Small Cause Courts Act (XV of 1882), section 35—Criminal Procedure Code (V of 1898), section 195.

The Registrar of the Court of Small Causes has authority, under section 195, clause (1) (a), of the Criminal Procedure Code (Act V of 1898), to grant a sanction for the prosecution of an offence under section 182 of the Indian Penal Code (Act XLV of 1860) as the public officer concerned.

It is competent to the Chief Judge of the Court of Small Causes, to whom the Registrar is by law subordinate, acting as a public servant, to revoke the sanction granted by the Registrar. But it cannot be revoked by the Small Cause Court composed of one or more Judges.

Application under section 435 of the Criminal Procedure Code (Act V of 1898) to set aside an order passed by a Full Court consisting of the Chief Judge and the Second Judge of the Presidency Small Cause Court at Bombay.

On the 12th July, 1902, the applicant, Goverdhandas Meghji, applied, under section 195 of the Criminal Procedure Code (Act V of 1898), to the Registrar of the Presidency Small Cause Court at Bombay for sanction to prosecute one Pragji Ramdas for the offence of giving false information to a public servant with intent to injure another person under section 182 of the Penal Code (Act XLV of 1860). The Registrar granted the sanction.

Pragji Ramdas applied on the 25th July, 1902, to the Chief Judge of the Presidency Small Cause Court at Bombay to revoke the sanction to prosecute granted by the Registrar. The Chief Judge caused a notice to be issued calling on Goverdhandas Meghji to show cause why this sanction should not be revoked.

On the 4th August, 1902, the notice came on before the Chief Judge for hearing, when Goverdhandas Meghji took the preliminary point that the matter was one for the Full Court and not for a single Judge to dispose of, relying upon sections 35 and 36 of the Presidency Small Cause Courts Act (XV of 1882).

^{*} Criminal Application for Revision No. 141 of 1902.

The notice was accordingly argued before a Full Court consisting of the Chief Judge and the Second Judge on the 5th August, 1902. The Full Court revoked the order granting the sanction.

Goverdhandas Meghji thereupon applied to the High Court under its Criminal Revisional Jurisdiction to set aside the order of revocation.

P. N. Godinho for the applicant:—The Full Court had no power to revoke the sanction granted by the Registrar. It has no criminal revisional power. Its power is regulated by section 77 of the Presidency Small Cause Courts Act (XV of 1982). The Registrar of the Presidency Small Cause Court has judicial powers under sections 35 and 36 of the Presidency Small Cause Courts Act (XV of 1882). He has power to grant sanction under section 195 (1) (a) of the Criminal Procedure Code (Act V of 1898). The granting of sanction is a judicial act (Queen-Empress v. Zorawar (1)), and an application to revoke a sanction is a criminal proceeding in revision: Queen-Empress v. Ganesh (2); Mahdi Husan v. Tota Ram (3); Zahur Ahmad v. Muhammad Husan. (4)

An application for a sanction must in the first instance be made to the Registrar: In re Raja of Venkatagiri (5); Empress of India v. Sabsukh. (6) That sanction having been given by him in his judicial capacity, neither the Chief Judge nor the Full Court of the Small Cause Court could interfere. It is only the High Court that has power to set aside the sanction under section 195 (7) (c) of the Criminal Procedure Code (Act V of 1898).

H. C. Coyaji for the opponent:—The sanction was rightly revoked. The Chief Judge has power to revoke a sanction granted by the Registrar. Section 13 of the Presidency Small Cause Courts Act (XV of 1882) shows that the Registrar is not a Judge but only the "Chief Ministerial Officer of the Court," and it enacts that "the Registrar.... shall exercise such powers, and discharge such duties, of a ministerial nature as the Chief Judge may from time to time, by rule,

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^{(1) (1890)} All. W. Notes, 1890, p. 168.

^{(2) (1897) 23} Bom. 50.

^{(8 (1892) 15} All. 61.

^{(4) (1893)} All. W. Notes, 1893, p. 147.

^{(5) (1871) 6} Mad. H. C. R. 92,

^{(6) (1879) 2} All. 533,

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direct." The Chief Judge has also the power to suspend the Registrar, and even to remove him, subject to the orders of the Local Government. Section 14 empowers the Local Government to invest the Registrar with the powers of a Judge under this Act "for the trial of suits in which the amount or value of the subject-matter does not exceed 20 rupees." When he is invested with the powers of a Judge under section 14 he exercises those powers only in suits specified in that section. For all other purposes he is merely "the Chief Ministerial Officer of the Court." For the purpose of the present case, however, section 14 need not be considered at all, as the Local Government has not invested the present incumbent with the powers referred to therein. Reliance is placed on section 35, and it is contended that in execution proceedings the Registrar sits as a Judge. The section no doubt confers on him the power to "make any order in respect thereof which a Judge of the Court might make under this Act," but it does not for that reason constitute him a Judge: Queen-Empress v. Tulja.(1) That was a case of a Registrar appointed under the Indian Registration Act (III of 1877), "as if he were a Court." The Registrar's proceedings under section 35 are of the "non-judicial or quasi-judicial" nature referred to in section 33.

Assuming that the Registrar had power to grant a sanction, the case falls under section 195 (1) (c) of the Criminal Procedure Code. The Chief Judge is the authority to whom the Registrar is subordinate, and therefore under section 195 (6) of the Code it is competent to the Chief Judge to revoke the sanction.

On the merits, we submit that the sanction was granted improperly, without notice to us and without any inquiry, and should be revoked. In In re Bal Gangadhar Tilak (2) their Lordships held: "It is true that notice is not legally necessary.....but....it is desirable (and is generally so recognized) that notice should be given before sanction is granted."

PER CURLIM:—This is an application to set aside an order purporting to be passed by a Full Court of the Small Causes Court, consisting of the Chief Judge and the Second Judge,

^{(1) (1887) 12} Dom. 36 at p. 42.

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revoking a sanction granted by the Registrar of the Court of Small Causes to prosecute one Pragji Ramdas for an offence under section 182 of the Indian P.nal Code.

It is contended that the Registrar in granting the sanction acted in a judicial capacity, being authorized under section 35 of the Small Cause Courts Act to make any order in respect of the committal and discharge of judgment-debtors which a Judge of the Court might make under the Act, and that the order granting sanction was passed while acting as a Judge, that under the provisions of section 195, sub-section (6), of the Criminal Procedure Code a sanction given under that section can only be revoked by any authority to which the authority giving it is subordinate, that under sub-section (7) of the same section a Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie, and that under clause (c) of the same sub-section, where no appeal lies, such Court shall be deemed to be subordinate to the principal Court of original jurisdiction within the local limits of whose jurisdiction such first-mentioned Court is situate. It was further urged that the Full Court had no appellate jurisdiction over the acts of the Registrar purporting to be done under section 35 of the Small Cause Courts Act and that it had no revisional criminal jurisdiction, that the only Court which could have revoked the sanction was the High Court under section 195, sub-section 7, clause (c), of the Criminal Procedure Code.

Assuming that the order was made by the Registrar in his judicial capacity, it seems to our minds quite clear that the Small Cause Court, whether presided over by a single Judge or by two Judges, had no jurisdiction to revoke the sanction, having regard to the provisions of section 195 of the Criminal Procedure Code. But it is unnecessary to discuss that question any further, because we are of opinion that the order granting the sanction must be held to have been passed by the Registrar as a public servant. Section 35, as well as certain other sections of the Small Cause Courts Act, refers to what a Judge of the Court may do, but there is no mention throughout the Act of any powers being conferred on a single Judge of the

IN RE GOVERDHAN-DAS. Court. With the exception of certain duties which are specifically imposed on the Chief Judge or his locum tenens, there appears to be no provision regarding the powers which may be exercised by a single Judge, and no rule has been pointed out to us under section 9 of the Act providing for the exercise by one or more of the Judges of any of the powers conferred on the Small Cause Court by the Act. The Act all along speaks of the powers of the Small Cause Court. We hold that the Registrar had authority under section 195, sub-section 1, clause (a), to grant a sanction for the prosecution of an offence under section 182, Indian Penal Code, as the public servant concerned. It was also equally competent to the Chief Judge, to whom the Registrar is by law subordinate, acting as a public servant, to revoke the sanction.

The difficulty in the case has arisen from the confusion which apparently existed in the mind of the Chief Judge as to the capacity in which he was by law empowered to act, and he was in error in treating the matter as one for decision of the Small Cause Court, as he appears throughout to have done, both in the proceedings, in his letter (No. 72 of 9th September, 1902) to the Registrar of the Court, and his subsequent statement of the case dated 19th September, 1902. We notice that in the final paragraph of that statement he observes: "The Registrar has never, during the twenty years since his office was created, granted a sanction to prosecute, and I have now issued an order to him that he should not do so again." It would be as well if the legality of such an order were reconsidered.

We are of opinion that the Small Cause Court had no power to revoke the sanction, and that the Full Court had no jurisdiction to do so, but that such power is vested in the Chief Judge to whom as a public servant the Registrar is subordinate. We therefore set aside the order, and return the case to the Chief Judge for passing such order as may seem to him proper in the circumstances of the case.

Order reversed.

APPELLATE CRIMINAL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

EMPEROR v. SHERUFALLI ALLIBHOY.*

1902. November 27.

Criminal Precedure Code (Act V of 1898), sections 234 and 235—Number of charges—Same transaction.

The fact that offences are committed at different times does not necessarily show that they may not be so connected as to fall within section 235 of the Criminal Procedure Code (Act V of 1898). The occasions may be different, but there may be a continuity and a community of purpose. The real and substantial test by which to determine whether several offences are so connected as to form the same transaction depends on whether they are so related to one another in point of purpose, or as cause and effect, or as principal and subsidiary acts, as to constitute one continuous action.

The accused was tried at one trial for three offences: (1) for having in his possession on the 9th October, 1902, certain stencil plates for the purpose of counterfeiting Hubbock and Company's trade-mark on two kegs of paint (section 485 of the Indian Penal Code), (2) for having, on or about the 7th October, 1902, sold 12 kegs of paint to which a counterfeit trade-mark was affixed (under section 486 of the Indian Penal Code), and (3) for having in his possession for sale on or about the 9th October, 1902, certain kegs of paint purporting to be Hubbock's paint having a counterfeit trade-mark (under section 486). He was convicted and separately sentenced for such offences. He appealed, contending that the trial was illegal, inasmuch as he had been charged at one trial with offences which were not connected together so as to form the same transaction, under section 285 (1) of the Criminal Procedure Code (Act V of 1898).

Held, dismissing the appeal, that the trial was not illegal. There was a community and also a continuity of purpose in the possession and the sale—the possession of the instruments was the cause, the possession of the kegs and their sale the effect, and both the possession and the sale had one intention and aimed at one result, namely, that of deceiving buyers into purchasing what was not the genuine article of Hubbock and Company.

APPEAL from a conviction and sentence recorded by J. Sanders Slater, Chief Presidency Magistrate of Bombay.

The accused was charged at one trial with the three following offences, viz.:

(1) having in his possession on the 9th October, 1902, certain stencil plates for the purpose of counterfeiting Messrs. Hubbock

Emperor v. Sherufalli. & Co.'s trade-mark on kegs of paint (section 485 of the Indian Penal Code);

- (2) with selling on the 7th October, 1902, 12 kegs of paint bearing a counterfeit trade-mark (section 486 of the Indian Penal Code); and
- (3) with having in his possession for sale on 9th October, 1902, a certain number of kegs of paint bearing a counterfeit trade-mark (section 486 of the Code).

The Magistrate convicted the accused on each charge, and sentenced him on the first to eighteen months' rigorous imprisonment, and on each of the others to one year's rigorous imprisonment. The sentences were ordered to run concurrently.

The accused appealed, contending, inter alia, that he had been illegally tried at one trial for three separate offences, those charged in the first two charges being punishable under different sections of the Indian Penal Code and having (as alleged) taken place at different dates, and that the acts which were alleged to constitute the two offences did not form part of the same transaction.

Strangman (with Messrs. Payne, Gilbert, Sayani and Moos) for the accused.

Scott (Advocate General) and Lowndes (with Messrs. Crawford, Brown & Co.) for the complainant.

CHANDAVARKAR, J.:—The petitioner, Sherufalli Allibhoy, was tried before the Chief Presidency Magistrate, Bombay, on three charges: firstly, under section 485 of the Indian Penal Code, having in his possession on the 9th October, 1902, certain stencil plates for the purpose of counterfeiting Messrs. Hubbock & Co. Limited's trade-mark on two kegs of paint; secondly, under section 486 of the Indian Penal Code, having on or about the 7th October, 1902, at Bombay, sold two kegs to which a counterfeit trade-mark was affixed without taking reasonable precautions, &c.; thirdly, under section 486 of the Indian Penal Code, having in his possession for sale on or about the 9th October, 1902, certain kegs of paint purporting to be Hubbock's paint, having a counterfeit trade-mark. The Magistrate convicted the petitioner on each of the charges and sentenced him to eighteen months'

rigorous imprisonment on the first and to one year's rigorous imprisonment on each of the other two charges. He also directed the sentences to run concurrently. The petitioner now appeals against the convictions and sentences.

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The first point raised before us in support of the appeal is that the trial was illegal and must be quashed, because the Magistrate charged the petitioner at one trial with offences which were neither of the same kind, under section 234, nor connected together so as to form the same transaction, under sub-section 1, section 235 of the Code of Criminal Procedure. Mr. Strangman, who has appeared for the petitioner and argued the appeal, conceded that if the offences of which his client has been convicted could be regarded as arising out of the same transaction, the point raised by him should fail. His argument is that they do not arise out of the same transaction, because the first charge related to having had possession on the 9th of October, 1902, of instruments for counterfeiting, whereas the second charge related to a sale on the 7th October, 1902, of certain counterfeit articles—that, in other words, as the two offences related to two different occasions, they could not be regarded as "one series of acts so connected together as to form the same transaction." Briefly put, the argument makes time the test, and the sole test, for determining whether two or more offences arise out of one and the same transaction. But, in my opinion, there is no principle on which we can hold that, merely because an offence is committed at one time and another offence is committed at another, they should be regarded as not falling within the category of offences contemplated by sub-section 1 of section 235 of the Code of Criminal Procedure, whatever in other respects be their interrelation or interdependence. Some of the illustrations to the sub-section in question serve to throw light on its real meaning. Illustration (c) says:

A entices B, the wife of C, away from C, with intent to commit adultery with B, and then commits adultery with her. A may be separately charged with and convicted of offences under sections 498 and 497 of the Indian Penal Code.

Here the enticing away and the adultery take place on different occasions, but the two acts are connected together, because there is not only continuity of time but also continuity of purpose in 1902.

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them, and, therefore, they are connected together so as to form the same transaction. Illustration (f) says:

A, with intent to cause injury to B, falsely accuses him of having committed an offence, knowing that there is no just or lawful ground for such charge. On the trial A gives false evidence against B, intending thereby to cause B to be convicted of a capital offence. A may be separately charged with and convicted of offences under sections 211 and 194 of the Indian Penal Code.

Here, again, the occasions when the two offences were committed were different; but there was a continuity and community of purpose. The real and substantial test, then, for determining whether several offences are connected together so as to form the same transaction depends upon whether they are so related to one another in point of purpose, or as cause and effect, or as principal and subsidiary acts, as to constitute one continuous action. A mere interval of time between the commission of one offence and another does not by itself necessarily import want of continuity, though the length of the interval may be an important element in determining the question of connection between the two. For instance, in Queen Empress v. Vajiram(1) proximity of time, combined with the case as to intention and similarity of action and result, was held to bring several offences as to several fraudulent transfers of property within the meaning of the words "same transaction" in section 235 of the Code of Criminal Procedure.

Judged by these considerations, the present case must be held to fall distinctly within the scope of sub-section 1 of that section. The petitioner sold a number of kegs having a counterfeit trade-mark of Hubbock's on the 7th of October, 1902; on the 9th October he was found in possession of more kegs of the same description and of instruments for counterfeiting them. There was a community and also continuity of purpose in the possession and the sale—the possession of the instruments was the cause, the possession of the kegs and their sale the effect; and both the possession and the sale had one intention and aimed at one result, of deceiving buyers into purchasing what was not the genuine article of Hubbock. There was, therefore, no illegality in the trial.

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Passing on to the merits, the main facts of the case relied upon by the prosecution and found proved by the Chief Presidency Magistrate on the evidence have not been challenged before us by Mr. Strangman in arguing the appeal; but the plea advanced in support of the petitioner's innocence is that he had taken charge of the shop where the counterfeit articles were found only six months before the finding. But no evidence was adduced before the Magistrate to prove that plea and to prove that the instruments for counterfeiting had been kept in the shop without his knowledge by his deceased partner and uncle. the absence of such evidence the Magistrate was right in giving effect to the evidence of the prosecution and attaching no weight to the unsubstantiated statement of the petitioner. As to the sentence which is complained of as excessive and severe, we do not think that it errs at all on the side of severity, considering the nature of the offence and the necessity, in public interests, of protecting commerce from fraudulent dealings. We dismiss the appeal.

Aston, J.:—I concur in the view that the possession up to 9th October, 1902, of stencil plates for the purpose of counterfeiting Messrs. Hubbock & Co.'s trade-mark, the possession for sale up to 9th October, 1902, of goods marked with the counterfeit trade-mark, together with the sale on or about the 7th October of certain kegs marked with the counterfeit trade-mark, were parts of "one series of acts so connected together as to form the same transaction," and the offences charged in respect of each of these acts could, therefore, under section 235 of the Criminal Procedure Code, be tried at the same trial. On the merits the guilt of the appellant is, I think, established by clear evidence, and there is no ground for reducing the sentences.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1902. December 1. THE COLLECTOR OF AHMEDABAD (ORIGINAL OPPONENT), APPELLANT—APPLICANT, v. SAVCHAND LADUKCHAND (ORIGINAL APPLICANT), RESPONDENT—OPPONENT.*

Probate duty—Letters of administration, duty on—Letters of administration granted in respect of joint property passing by survivorship—Application for refund of duty—Court Fees Act (VII of 1870), section 19 D, and article XI of schedule I.

A Hindu died intestate leaving two sons who were joint with him. Part of the deceased's estate consisted of two sums of Rs. 5,000, one of which was deposited with the Bank of Bombay and the other with a Commercial Company. Both the Bank and the Company refused to pay these sums unless letters of administration were obtained. Letters of administration were accordingly obtained in respect of these portions of the estate of the deceased and a sum of Rs. 207-2-0 was paid as duty thereon under article XI, schedule I of the Court Fees Act (VII of 1870). Subsequently an application was made for a refund of this amount on the ground that the property in respect of which it had been paid was the joint property of the deceased and his sons and had passed to the latter by survivorship, and that, therefore, under section 19 D of the Court Fees Act (VII of 1870) no duty was chargeable.

Held, that the refund could not be allowed. The section only applies where probate or letters of administration have already been granted on which the Court-fee has been paid. In such case no further duty is payable in respect of property held by the deceased as trustee. But where no duty has been paid the section does not apply. Here no letters of administration had been granted other than those in respect of which the refund was applied for. Therefore, there were no letters on which the Court-fee had been paid so as to bring the case within the section and to entitle the present letters of administration to exemption.

Held, also, that in the present case no letters of administration were necessary. The family property vested in the sons at once by survivorship (section 4 of Act V of 1881). But when the letters of administration were applied for, the applicant must be taken to have adopted the case of the Bank of Bombay, that so far as the sons were concerned the deposit was made by the deceased, and that it was his estate. Having invoked the jurisdiction of the

^{*} First Appeal No. 88 of 1902 (under Act V of 1881).

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Court by means of that statement the applicant could not be allowed to say that the statement was incorrect and that no letters of administration were necessary.

APPEAL from an order treated as an application under section 622 of the Civil Procedure Code (Act XIV of 1882) to set aside the order for the refund of the Court-fee paid on letters of administration passed by S. L. Batchelor, District Judge of Ahmedabad.

One Maganlal Ladukchand died intestate leaving him surviving two minor sons, who were joint with him.

Part of Maganlal's estate consisted of a sum of Rs. 5,000 which he had deposited in the Bank of Bombay and another sum of Rs. 5,000 which he had deposited with a Commercial Company.

After his death payment of these two sums was demanded on behalf of the minor sons, but both the Bank and the Company refused to pay unless letters of administration were obtained.

The respondent Savchand thereupon applied to the District Court at Ahmedabad for letters of administration to the estate of the deceased and he paid Rs. 207-2-0 as duty payable under article XI, schedule I of the Court Fees Act (VII of 1870) on the value of the estate in respect of which the letters of administration were applied for. His application was granted and letters of administration issued to him.

Subsequently he applied for a refund of the duty paid (Rs. 207-2-0), on the ground that, inasmuch as the above two sums, in respect of which the letters of administration had been granted, were undivided family property and had passed to the sons by survivorship, no probate duty was chargeable under section 19 D of the Court Fees Act (VII of 1870).

The District Judge of Ahmedabad granted the application and ordered the money to be refunded.

The Collector of Ahmedabad appealed to the High Court against this order.

As, however, it appeared that the Collector had not been a party to the proceedings in the District Court and therefore had no right of appeal, their Lordships allowed this case to be argued as an application for the exercise of the Extraordinary

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Jurisdiction of the High Court under section 622 of the Civil Procedure Code (Act XIV of 1882).

The Government Pleader for the applicant.

G. S. Rao for the opponent.

CHANDAVARKAR, J.:— This is an appeal from an order passed by the District Judge of Ahmedabad, granting the application made by the respondent, Savchand Ladukchand, for the refund of Rs. 207-2-0 deposited by him in Court with his petition for letters of administration to the estate of Maganlal Ladukchand.

The application for refund was made under the following circumstances: Maganlal Ladukchand had deposited a sum of Rs. 5,000 with the Bank of Bembay and another sum of Rs. 5,000 with a Commercial Company. He died leaving two minor sons. A demand was made on behalf of the minor sons from the Bank and the Company for the respective deposits, but they declined to pay the sums unless letters of administration were taken out for the estate of the deceased. Accordingly the respondent, Savchand Ladukchand, made an application to the District Court of Ahmedabad for letters of administration and he deposited Rs. 207-2-0 to cover the probate duty chargeable under article XI, schedule I to the Court Fees Act, on the value of the estate in respect of which the grant of letters was applied for.

The letters having been granted, the respondent applied for a refund of the deposit of Rs. 207-2-0 on the ground that, as the estate in respect of which letters of administration were granted had belonged to the deceased as the undivided family property of himself and his sons, and as on his death it had passed to the sons by survivorship, no probate duty was chargeable under section 19 D of the Court Fees Act.

The District Judge has allowed the application for refund, holding, on the authority of the ruling of the Calcutta High Court in *In the goods of Pokurmull Augurwallah*, (1) that as the deceased Maganlal Ladukchand was joint with his sons, he held the estate as a trustee for them within the meaning of section 19 D of the Court Fees Act.

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The Collector of Ahmedabad now appeals against the order of the District Judge. As the ground of the appeal is that the case does not fall within the class contemplated by section 19 D of the Court Fees Act, it raises the question whether the application for letters of administration was one admitting of valuation by the Judge. As such, his order would have been appealable had the Collector been a party to the application: Dada v. Nagesh. But as he was not a party he cannot appeal. We can, however, interfere under our Extraordinary Jurisdiction, if the order of the District Judge allowing a refund to the respondent was passed by him without jurisdiction, on the principle of the ruling of this Court in The Collector of Kanara v. Rambhatt and The Collector of Ratnagiri v. Janardan. (3)

The question, therefore, is whether the District Judge had jurisdiction to pass the order. That jurisdiction he has exercised under section 19 D of the Court Fees Act, which runs thus:

The probate of the will, or the letters of administration of the effects, of any person deceased, heretofore or hereafter granted, shall be deemed valid and available by his executors or administrators for recovering, transferring or assigning any moveable or immoveable property whereof or whereto the deceased was possessed or entitled, either wholly or partially as a trustee, notwithstanding the amount or value of such property is not included in the amount or value of the estate in respect of which a Court-fee was paid on such probate or letters of administration,

It is clear upon the plain grammatical construction of this section, that where probate has or letters of administration of the effects of any person deceased have been granted, and where a Court-fee has been paid on them, such probate or letters and such payment operate on and apply to any other effects or estate held by the deceased, wholly or partially, as a trustee, without the payment of any additional Court-fee. In other words, for the operation of this section it is an essential condition that there must be a previous probate or letters of administration on which a Court-fee has been paid. That is the basis of the exemption from the payment of Court-fee allowed by the section. But

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where no such duty has been paid, there is no case for the section Had the Legislature intended to exempt without exception probate or letters of administration in respect of estates held by deceased persons as trustees, apt language would have been used to cover that meaning. That such was not their intention appears very clearly not only from the language of section 19 D, but also from section 4 and article XI of schedule I to the Court Fees Act. According to section 4, all documents of the kind mentioned in schedule I are chargeable with Courtfees. Article XI of that schedule fixes an ad valorem fee on "probate of a will or letters of administration with or without will annexed." These words are large enough to include probate or letters of administration in respect of all kinds of property, whether held by a deceased person in his own right or as a trustee. The general rule, therefore, according to the Act, is that probate or letters of administration for an estate, whatever be the character in which the deceased held them, shall be chargeable But the Legislature has provided certain with a Court-fee. exceptions to that rule, and one of them is the class of cases falling within the terms of section 19 D. The present case does not belong to that class. No letters of administration have been granted of the effects of the deceased Maganlal Ladukchand other than those now in dispute. Therefore there are no letters. on which any Court-fee was paid that can bring the case within section 19 D and entitle the present letters to exemption.

Mr. Rao for the respondent has, however, pressed us with the hardship of the case. He has urged that as Maganlal died a member of a joint family in respect of the estate to which the letters of administration granted relate, his sons became its owners, not as heirs or as the legal representatives of Maganlal, but by survivorship, and letters of administration were taken out simply because the Bank of Bombay would not return the deposit without them. We do not see, however, where the hardship lies. It is, no doubt, the law that in an undivided Hindu family, when a coparcener dies, there are no effects or property of his to which the surviving coparceners can succeed as his heirs, but they take the whole of the family property by right of survivorship. Maganlal's sons were not, therefore,

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bound to take letters of administration for any estate or effects of Maganlal, because there was no such estate that could be called his. On his death the family property vested in the sons at once by survivorship (see section 4 of the Probate and Administration Act). But when, nevertheless, the respondent applied for letters, he must be taken to have adopted the case of the Bank that, so far as they were concerned, the deposit was made by Maganlal and that it was his estate, whatever rights others might have to it. And that was substantially what the respondent alleged and made the foundation of his claim in his petition for letters of administration. It is true that in that petition he stated that the deceased Maganlal and his sons had been joint and that the sons had become owners of the deposits by survivorship. But to prevent that statement operating as a bar to the Court's jurisdiction to grant the letters, he went on to state in paragraphs 3 to 5 that the property belonged to the deceased. It is by means of this latter statement that he invoked the jurisdiction of the Court, and as the Court granted the letters, it must be taken to have granted it on the basis that the property belonged to Maganlal irrespective of the question as to the rights of any other persons to it. The respondent, having availed himself of the Court's jurisdiction on that allegation, cannot now be allowed to turn round and say that the allegation is incorrect and that no letters of administration were, strictly speaking, necessary, is not contended before us that the District Court had no jurisdiction to grant the letters. All that is urged is that the grant of the letters was made to an estate which really did not exist and that, therefore, no Court-fee was payable. the respondent's own case in his petition that such an estate as was required for the grant of letters of administration did exist; having succeeded on that case, he cannot now disclaim it for the purpose of recovering the Court-fee which was chargeable on the petition.

Under these circumstances it is not necessary to decide whether a father or a manager in an undivided Hindu family holding its property for himself and other coparceners is a trustee within the meaning of section 19 D of the Court Fees Act. Assuming that he is a trustee, we are unable, for the

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reasons above given, to follow the ruling of the Calcutta High Court in the case of In the goods of Pokurmull.(1)

We think that in this case the District Judge has assumed jurisdiction under section 19 D of the Court Fees Act which that section does not give, and we must, therefore, allow the appeal to be converted into an application under section 622 of the Civil Procedure Code. Under our Extraordinary Jurisdiction we set aside the order of the District Judge. Respondent to pay the costs of this application and of the application to the lower Court.

Order reversed.

(1) (1896) 23 Cal. 980.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Batty.

1902. December 2. ISHVAR TIMAPPA HEGDE (ORIGINAL DEFENDANT 2), APPELLANT, v. DEVAR VENKAPPA SHANBOG AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT 1), RESPONDENTS.**

Fraudulent conveyance—Suit by one creditor to set aside deed—Creditor not a judgment creditor—Transfer of Property Act (IV of 1882), section 53—Meaning of the word "creditor"—Statute 13 Eliz., c. 5.

Under section 53 of the Transfer of Property Act (IV of 1882), a creditor may sue to set aside a deed executed by his debtor by which he (the creditor) is defrauded, defeated or delayed, although he has not obtained a decree for the debt in respect of which he is a creditor. But such a creditor can only sue on behalf of himself and all other creditors.

APPEAL from an order of remand passed under section 562 of the Civil Procedure Code (Act XIV of 1882) by Mr. E. H. Leggatt, District Judge of Kanara, reversing the decree of Mr. E. H. Rego, Subordinate Judge of Kumta, and remanding the case for decision on the merits.

The plaintiff alleged that the first defendant owed him Rs. 600, and that in order to defeat this claim and the claims of other

lawful creditors the first defendant, on the 27th April, 1900, had, without consideration, transferred all his property to the second defendant by a deed of sale of that date, which stated the consideration for the transfer to be Rs. 2,500. The plaintiff alleged that the property was worth Rs. 4,000. He prayed that the deed should be cancelled and the sale set aside.

The Subordinate Judge raised a preliminary issue whether the suit was maintainable. This issue he found in the negative and he dismissed the suit. He was of opinion that the plaintiff not being a judgment-creditor of the first defendant was not entitled to sue to have the deed in question set aside. In his judgment he said:

From the illustrations to section 39 of the Specific Relief Act it is clear that plaintiff has no interest in the sale-deed to ask for its cancellation.

Section 53 of the Transfer of Property Act presumes that plaintiff has been actually defeated, delayed or defrauded, while here the plaintiff holds neither a decree nor a bond: he simply alleges that defendant 1 owes to him about Rs. 600.

If such suits be tenable, then any person imagining himself to be a creditor may try to question any alienation made by his supposed debtor, while the law is explicit that a debtor may give preference to any of his lawful creditors.

On appeal by the plaintiff, the Judge reversed the decree and remanded the case for decision on the merits. He was of opinion that the word "creditor" in section 53 of the Transfer of Property Act (IV of 1882) did not necessarily mean "a judgment-creditor," and that any creditor might sue under that section. In his judgment he said:

The issue for decision is, can plaintiff maintain the suit?

The above issue was read over to the pleaders of the parties and no further issue was sought.

I find in the affirmative for the following reasons:

Plaintiff alleges that defendant owes him some money; defendant denies this. Defendant 1 has sold some property to defendant 2, and plaintiff says this will defraud him and sues to have the sale set aside. The Subordinate Judge found that as plaintiff had not obtained a decree against defendant 1, he had no locus standi.

Section 53 of the Transfer of Property Act lays down that a transfer of immoveable property made with intent to defeat or delay the creditors of the transferor is voidable at the option of any person so defeated or delayed. The question is whether "creditor" means a person who alleges that money is due to him from the transferer or a person holding a decree against the transferer.

ISHVAR TIMAPPA v. DEVAR VENKAPPA. I am referred to the case of *Gopal* v. *Bank of Madras*, (1) but in that case it is not stated whether the creditors held decrees or not. Probably if they had held, then it would have been so stated.

In the Civil Procedure Code a person whose claim has been adjudicated and who has obtained a decree is called a decree-holder: and I do not think that the word "creditor" used in that Code can ever be intended to mean a decree-holder.

In section 91 of the Transfer of Property Act reference is made to a judgment-creditor and also to a creditor who has obtained a decree for sale. I think this shows that when the word "creditor" is used by itself its meaning is not limited to that of the word "judgment-creditor." It must mean a person who is, as a matter of fact, a creditor, i.e., one to whom money is actually due, whether the fact is denied or not by the defendant.

I therefore think the plaintiff can maintain the suit, though of course the question whether or no he is a creditor of defendant 1 must be settled in the suit. If he is found not to be, he will have no locus standi, and the suit will have to be dismissed. There is further no need to decide on the amount, if any, due from defendant 1 to plaintiff. It is sufficient if plaintiff prove that defendant 1 owes him anything. I therefore reverse the decision of the Subordinate Judge and remand the case for fresh decision upon the merits. Costs to be costs in the suit.

The second defendant appealed against the order of remand.

Shamrao Vithal for the appellant (defendant 2):—The point is whether any person alleging himself to be the creditor of another can sue to have a deed of conveyance executed by the latter to a third person set aside under section 53 of the Transfer of Property Act. We submit that unless a creditor has established his right, that is, unless he has previously obtained a decree for his debt, he cannot sue under section 53. The debt must be either a proved debt or an admitted debt. Here it is neither the one nor the other, for the first defendant distinctly denies that he owes as y money to the plaintiff: Rajan Harji v. Ardeshir Hormusji. (2)

Nilkanth A. Shiveshvarkar for the respondent (plaintiff):—The contention that the debt must either be a proved debt or an admitted debt is not warranted by the terms of section 53 of the Transfer of Property Act. Section 91 of the Act distinguishes a "judgment-creditor." from a "creditor." It is clear, therefore,

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that if the framers of the Act intended that in section 53 the word "creditor" should only mean judgment-creditor, it would be so stated. We admit that unless the plaintiff proves himself to be the creditor of the first defendant he is not entitled to the relief prayed for, but he is prepared to prove that fact in the present suit. Even if he had previously obtained a judgment against the first defendant, it would be necessary for him to adduce evidence to prove the debt in the present suit in order to get relief. Therefore the contention that in order to file this suit he must be the proved or admitted creditor cannot be sound.

The law as to fraudulent conveyance is laid down in Statute 13 Eliz., c. 5. Under that statute it was not necessary for a creditor to obtain a judgment for the debt previously to his filing a suit for setting aside a transfer: Reese River Silver Mining Company v. Atwell. (1) The same principle is laid down in section 53 of the Transfer of Property Act.

JENKINS., C.J.:—This appeal raises the point whether a person can sue under section 53 of the Transfer of Property Act before he has obtained a decree on the debt by virtue of which he claims to be a creditor of the transferer.

Under the Statute 13 Eliz., c. 5, on which this section is in part based, a creditor can sue before recovering judgment on his debt, but the words of that statute are no doubt different. difficulty here is created by the provision in section 53 that the transfer is voidable at the option of any person so defrauded, defeated or delayed, for it may be argued that a creditor whose debt is not established by a decree does not fall within this description. But it appears to us that this is a question to be determined by reference to the facts of each case. The decree is evidence—and valuable evidence—that he who complains is a creditor; but it is not the only evidence. The plaintiff's position may be proved otherwise, and proved as against the debtor, where, as here, he is a party to the suit. The absence, then, of a decree is not fatal: though it may have the result that the proof required of the creditor becomes more complicated, and the standard more exacting to prove the conditions requisite to success.

Isevae Timappa e. Devar Venkappa. But while a creditor in the position of the present plaintiff is entitled to sue, he can only do so on behalf of all other creditors of the transferer, so that when the case goes back to be dealt with on the merits, it will be necessary for the Court to bear this in mind, and require such amendments as may be necessary to bring the suit into conformity with this rule of law.

As far as this appeal is concerned the order of the District Judge is confirmed. Costs to be costs in suit.

Order confirmed.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar, Mr Justice Batty and Mr. Justice Aston.

1902. December 4 NANDUBAI AYAL MANGALDAS BHANJI (PLAINTIFF) v. GAU BIN HALIA BAGAL (DEFENDANT).*

Stamp—Indian Stamp Act (II of 1899), schedule I, articles 23, 24—Conveyance—Havala(1)—Letter by a debtor authorising payment to his creditor of money due to him (the debtor) by a third person.

The defendant authorized the plaintiff, his creditor, to receive a sum of money on his behalf, due to him by the Panjrapol authorities at Bhiwandi, by a letter which ran as follows:

To-The DAROGA OF THE PANJRAPOL, Bhiwandi.

I, Gan bin Halia of Khoni, beg to apply that I have completely fulfilled the agreement to supply fodder for Samvat year 1956, and that the sum of Rs. 22, due to me on account, should be made over on my behalf to Shet Mangaldas Bhanji. He will sign on my behalf, and I consent to his doing so. This application for the havala is given in writing. It is requested you will accept it.—6th March 1900.

(Signed) GAU HALIA.

This letter was written on an unstamped paper. On a reference by the Subordinate Judge to ascertain the requisite stamp upon it,

Held, that as the document in question effected a transfer of property by defendant to his creditor (plaintiff) in consideration of a debt due to the

* Civil Reference No. 17 of 1902.

(1) Havala means an order or draft for money drawn by a ryot on the banker or grain-dealer to whom he has sold his crop or entrusted it for sale. (Wilson's Glossary of Judicial and Revenue Terms, p. 204.)

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latter, it fell within the definition of conveyance in the Indian Stamp Act (II of 1899) and should be stamped as such.

REFERENCE by Ráo Sáheb Janardhan Damodar Dikshit, Second Class Subordinate Judge of Bhiwandi, under section 60 of the Indian Stamp Act (II of 1899).

The plaintiff sued to recover money alleged to be due by the defendant to the plaintiff's deceased husband Mangaldas Bhanji. At the hearing the defendant relied (inter alia) on the following havala addressed by him to the Panjrapol authorities at Bhiwandi, requesting that a sum of Rs. 22, which was due by them to him, should be paid on his behalf to the said Mangaldas Bhanji:

To-The DAROGA OF THE PANJRAPOL, Bhiwandi.

I, Gau bin Halia of Khoni, beg to apply that I have completely fulfilled the agreement to supply fodder for Samvat year 1956, and that the sum of Rs. 22, due to me on account, should be made over on my behalf to Shet Maugaldas Bhanji. He will sign on my behalf, and I consent to his doing so. This application for the havala is given in writing. It is requested you will accept it.—6th March 1900.

(Signed) GAU HALIA.

The defendant also relied on certain receipts given by Mangaldas Bhanji to the Panjrapol authorities for moneys similarly paid to him by them on the plaintiff's behalf. These receipts were contained in bound books and receipt stamps were affixed against the entries of payment and the signatures of the recipients were taken upon them. As the books belonged to a person not a party to the suit, copies of the entries and of the havala were placed on the record under section 141-B, clause 2, of the Civil Procedure Code (Act XIV of 1882). Their originals were in Gujarati. The Clerk of the Court attested the copies under clause 3 to section 141-A of the Civil Procedure Code on the strength of affidavits made by the person making the copies and translations. These copies were not certified and were produced on plain paper.

The Subordinate Judge referred to the High Court the following questions:

1. Is the letter authorizing payment of the money to Mangaldas liable to stamp duty under Act II of 1899, and if so, with what stamp duty?

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The opinion of the Subordinate Judge on the first point was that the letter in question is either a bill of exchange payable on demand or a letter of credit and liable to be stamped with a one-anna stamp either under article 13, clause (a), or article 37 of schedule I of Act II of 1899. (2) That the copies required by the Court were not liable to be stamped either under the Stamp or the Court Fees Act.

There was no appearance for either party.

CHANDAVARKAR, J.:—My answer to the first question is that the paper containing the *havala* is a conveyance and must be stamped as such under the Indian Stamp Act (II of 1899).

"An order for payment of money, though expressed to be payable out of a definite debt or fund, must be properly stamped as a bill of exchange, and if not stamped at the time of issue, cannot be stamped afterwards. But an order for payment out of a debt accruing due under a contract, as for goods sold, or for work and labour, or the like, is an assignment of a debt which must be stamped as a transfer of property" (Leake on Contracts, 3rd Edition, page 1005, citing Buck v. Robson, (1) and Ex parte Shellard(2)). In Ex parte Shellard a letter from a creditor to his debtor for payment of money to a creditor of the former was held liable to be stamped as a bill of exchange. Buck v. Robson, Cockburn, C.J., and Mellor, J., differed from that view and held such a letter to be an assignment of a debt for the purposes of stamp duty. Cockburn, C.J., said (page 691): "In our acceptation of the term, an order for the payment of money presupposes moneys of the drawer in the hands of the party to whom the order is addressed, held on the terms of applying such moneys as directed by the order of the party entitled to them. No such obligation arises out of the ordinary contract of sale. If a purchaser buys goods of a manufacturer or a tradesman, he undertakes to pay the price to the seller, not to a third party, who is

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a stranger to the contract, nor will the mere order or direction of the seller to pay to a third party impose any such obligation upon him; it is only when and because the right of the seller to the price has been transferred to the third party by an effectual assignment that the assignee becomes entitled as of right to the payment... Being ourselves decidedly of opinion that an order from a creditor to his debtor under an ordinary contract for the price of goods, or for work and labour, or the like, to pay to a third party can confer a right on the latter only so far as it operates as an assignment of the debt, we feel ourselves warranted, on the authority of Brice v. Bannister, (1) in acting on that view notwithstanding the decision in Ex parte Shellard. (2) "In Ex parte Hall, In re Whiting, (3) the principle of the decision in Brice v. Bannister, on which Buck v. Robson (4) proceeded, was approved.

In the reference before us now the letter containing the havala was addressed by Gau Halia to the Panjrapol authorities because Rs. 22 were due to him from the latter for grass sold. That amount was therefore due to him under an ordinary contract for the price of his goods. He directed the Panjrapol authorities to pay that price to his creditor, so that the letter operated as an assignment of the debt to the latter. It was a transfer of property by Gau Halia to his creditor in consideration of a debt due to the latter (see section 24 of the Stamp Act, II of 1899). The letter falls, therefore, within the definition of 'conveyance' in that Act and must be stamped as such. The amount or value of the consideration for the assignment is not set forth in the letter. Article 23 of schedule I to the Stamp Act does not, therefore, apply, but under section 24 of the Act, "where any property is transferred to any person in consideration, wholly or in part, of any debt due to him," such debt is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the transfer is chargeable with ad valorem duty. The amount or value of the consideration for the havala would be the amount or value of the debt, wholly or in part, as the case may be, due from Gau Halia to his creditor to whom he assigned the debt due from the Panjrapol authorities.

^{(1) (1878) 3} Q. B. D. 569.

^{(2) (1873)} L. R. 17 Eq. 109.

^{(3) (1878) 10} Cb. D. 615. (4) (1878) 3 Q. B. D. 686.

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As to the second question, the reference is made to us not only under the Stamp Act but also under the Court Fees Act. There is no provision of law empowering the Subordinate Judge to make a reference to this Court or giving us jurisdiction to answer it under the Court Fees Act. I would, therefore, decline to answer the second question so far as it relates to that Act. So far as it is a reference under the Stamp Act, the decision in Kastur v. Fakiria (1) is clear. It was held there that "copies furnished under section 141-A do not come within article 24 of schedule I of the Stamp Act, 1899."

Batty, J.:—I entirely concur.

ASTON, J.:-I concur.

(1) (1902) 26 Bom. 522.

APPELLATE CIVIL.

1902. December 2. Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Batty.

RAJMAL MOTIRAM AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, v. SHIVAJI ANANDRAV (ORIGINAL PLAINTIFF), RESPONDENT.*

Mortgage—Subsequent money bonds—Provision as to the payment of the bonds before redemption—Clogging the equity of redemption—Once a mortgage always a mortgage, and nothing but a mortgage.

In the year 1869 the plaintiff's deceased father mortgaged his lands with possession to the defendants' deceased father under two mortgage-deeds, and in the year 1882 the plaintiff passed two money bonds to the defendants' deceased father, which contained a clause providing that the amount due on the mortgages should not be paid in redemption of the property unless that which was due on the money bonds was also paid.

The plaintiff having filed a suit to redeem the lands, the defendants objected to the redemption under the above clause.

PER CURIAM.—Following Noakes & Company, Limited, v. Rice, (1)—a clause which has the effect of clogging the equity of redemption is void. Hari Mahadaji v. Balambhat (2) doubted.

Second appeal from the decision of Ráo Bahádur A. G. Bhave, First Class Subordinate Judge of Sholápur, with Appellate

Powers, confirming the decree passed by Ráo Sáheb D. W. Bhat, Subordinate Judge of Karmála.

Suit for redemption.

The property in suit was mortgaged with possession to the defendants' father in the year 1869 by two mortgage-deeds dated, respectively, 1st May, 1869, and 6th July, 1869. The first mortgage was for Rs. 400 and the second for Rs. 300.

The defendants denied the plaintiff's right to redeem. They alleged that on the 17th July, 1882, the plaintiff had executed to their father (the original mortgagee) two money bonds which provided that the debts secured by them should be satisfied before the mortgages were redeemed.

These debts had not been paid and the defendants, therefore, contended that the plaintiff was not entitled to redeem the mortgages.

The Subordinate Judge passed a decree for the plaintiff. He held that the mortgage-debt had been satisfied and also the debts secured by the two money bonds.

On appeal the decree was confirmed with some slight variations which are not material to this report.

The defendants preferred a second appeal. They contended that the debts due under the mortgages and under the later money bonds had not been satisfied, and that the plaintiff was bound by his agreement not to redeem contained in the money bonds. On this point Hari Mahadaji v. Balambhat⁽¹⁾ and Yashvant v. Vithoba⁽²⁾, were cited for the appellants. The respondent cited Ghose's Law of Mortgage in India (3rd Ed.); pages 271, 273.

Ratanji R. Desai for the appellants (defendants).

N. V. Gokhale for the respondent (plaintiff).

JENKINS, C.J. (after referring to other points which are not material to this report, continued):—Then it is argued that as the two later bonds passed in favour of the mortgages provided that the amount due on the mortgages could not be paid off in redemption of the property, without also paying

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that which was due on those bonds, the lower Appellate Court should have awarded redemption only on those terms. The subsequent bonds are not registered, and it is conceded that they do not create any charge on the land; but it is said that notwithstanding this, warrant for the appellants' contention is to be found in Hari Mahadaji v. Balambhat.(1) The lower Appellate Court, however, is not satisfied that there is anything due on the bonds, and so we are not under the necessity of considering whether the cited decision involves a violation of the principle that an equity of redemption cannot be clogged. The meaning of that rule has been recently expounded in Noakes & Company, Limited v. Rice(2) by Lord Davey, who, dealing with the doctrine that a provision or stipulation which will have the effect of clogging or fettering the equity of redemption is void, says it might be expressed in this form: "Once a mortgage always a mortgage and nothing but a mortgage," and then continues: "The meaning of that is, that the mortgagee shall not make any stipulation which will prevent a mortgagor, who has paid principal, interest and costs, from getting back his mortgaged property in the condition in which he parted with it." We have merely referred to this aspect of the case in order that it may not be supposed that we accept the view which is said to have found favour in Hari Mahadaji's case.(1)

The last point urged is that the lower Appellate Court improperly cast upon the mortgagees the burden of proving as to the amount of the sum advanced on the occasion of the mortgage. We think it acted quite within its right when regard is had to section 12 of the Dekkhan Agriculturists' Relief Act.

Decree confirmed with costs.

Decree confirmed.

(1) (1884) 9 Bom. 233,

(2) (1902) A. C. 24.

APPELLATE CIVIL.

Before Mr. Justice Chandaavrkar and Mr. Justice Aston.

VADILAL LALLUBHAI (OBIGINAL PLAINTIFF), APPELLANT, v. SHAH KHUSHAL DALPATRAM AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

1902. December 3

Partnership—Joint Hindu family—Fartners—Coparceners not necessarily partners—Suit in the name of the owner of the firm—Parties—Adding parties—Civil Procedure Code (Act XIV of 1882), section 27.

The plaintiff sued as owner of a firm to recover a debt. The defendants pleaded that the plaintiff was joint with his father and brother, and contended that the latter were therefore partners in the firm and ought to be joined as plaintiffs. The lower Appellate Court held that the plaintiff's father and brother were partners with him by reason of their being joint members of a Hindu family and that they ought, therefore, to have been co-plaintiffs. It further held that it was too late to amend the plaint and to add them as parties, and it therefore dismissed the suit. On second appeal,

Held (reversing the decree and remanding the case), that although a person carrying on business is a coparcener in a joint family, it does not necessarily follow that all his coparceners are his partners in that business, entitled with him to its rights and responsible with him for its liabilities. The fact of partnership must be proved by evidence showing that the persons alleged to be partners have agreed to combine their property, labour or skill in the business and to share the profits and losses thereof.

Held, also, that if on remand it was found that the plaintiff's father and brother were partners, the Court ought to allow them to be brought on the record, and under section 27 of the Civil Procedure Code (Act XIV of 1882) the plaintiff was entitled to amend.

Kasturchand v. Sagarmal(1) followed.

SECOND appeal from the decision of H. Page, Joint Judge of Ahmedabad, reversing the decree passed by Ráo Bahádur Chandulal Mathuradas, First Class Subordinate Judge at Ahmedabad.

The plaintiff sued as owner of the firm of Chamanlal Vadilal to recover the sum of Rs. 1,882 with interest.

The defendants alleged (inter alia) that the plaintiff was a member of a joint Hindu family, of which his father and his minor brother Chamanlal were also members, and they contended

VADILAL c. SHAH KHUSHAL that, as such, the latter were the plaintiff's partners in the firm and ought to have been made co-plaintiffs. The Subordinate Judge passed a decree for the plaintiff, holding that the claim was proved and that the suit was not bad for non-joinder of plaintiffs. In his judgment he said:

It cannot, I believe, be disputed that the plaintiff Vadilal's father is living with him. But the present suit is brought by Vadilal as the owner of the firm of Chamanlal Vadilal, which carried on its business at Bombay. The plaintiff's witness (No. 39) affirms that the firm belongs to Vadilal alone, and his father says that Vadilal has opened the shop at Bombay. The acknowledgment seems to have been passed to Vadilal alone: while the plaintiff's father Lallubhai, and Manilal and Ghellabhai, admit in their depositions that they have no share or interest in the plaintiff's firm. The defendants' attempt to show that they are partners in the plaintiff's shop appears to me to have failed and the plaintiff alone can maintain this suit.

On appeal the Joint Judge reversed the decree. He held that the suit was bad for non-joinder of Lallubhai, Chamanlal, Ghellabhai and Manilal, and as it was too late to amend, the period of limitation having expired, he dismissed the suit. In his judgment he said:

The plaintiff's father Lallubhai owns that he is joint with his son. He admits having lent him money. The learned pleader for the plaintiff urges that he only lent him money after the business had been started, and asks the Court to place reliance on the fact that he states that his son commenced trading with money borrowed from Popathhai Amarchand. But I cannot do so. The father's statement on the point is nowhere corroborated, and it is highly improbable that it should be true. Moreover, the presumption is of union in a Hindu family, and where, as in the present case, union is admitted, it lies, I think, on the plaintiff to prove his contention that, though he is joint with his father in living, he trades separate from him. The scanty proof adduced in the present case is whelly inadequate. I hold that Lallubhai is joint with his son, the plaintiff. So, too, I take it, it must be presumed that the minor Chamanlal is joint with the plaintiff.

But it is urged, relying on 17 Bom. 413 and 7 All. 284, that the suit is not bad for misjoinder as it has been brought in the name of the firm. The learned pleader's contention is that there has been a misdescription, but no misjoinder. I am unable to agree with the view he puts forward. In 17 Bom. 413, the plaintiff was described as "the firm of K. S. by its manager S. S.," and the proposed addition was that of one of the partners of the firm. Such was also the case in 7 All. 284, the partners of the Elgin Mills Company being placed on the record as defendants, whereas before their application only the name of

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the firm had been given. In the present case the suit was brought by the plaintiff as owner of the firm Chamanlal Vadilal, and not as the manager. And where he has sued as sole owner I think he is estopped from coming forward and stating that he was not, or even admitting for the sake of argument that he was not. He must stand or fall by the contention he raised in the lower Court. Under these circumstances I decide the first issue in the affirmative.

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The plaintiff preferred a second appeal.

G. S. Rao for appellant (plaintiff):—The suit is brought in the name of the firm, and therefore it is not necessary to join all partners. He referred to section 22 of the Limitation Act (XV of 1877) and to Manni Kasaundhan v. Crooke (1); Pragi Lal v. Maxwell (2); Kasturchand v. Sagarmal (3); Muhammad v. Himalaya Bank.

L. A. Shah for respondent No. 1 contended that all the partners in the firm should be joined as parties, and referred to Kalidas v. Nathu, (5) Ramsebuk v. Ramlall, (6) Samalbhai v. Someshvar, (7) and Ramkrishna v. Ramabai. (6)

D. W. Pilgamkar for respondent No. 2.

CHANDAVARKAR, J.:—The Joint Judge, differing from the Subordinate Judge, has rejected the suit on the ground that the plaintiff is not the only partner in the firm of Chamanlal Vadilal, but that his father and his minor brother also are partners who ought to have been added as co-plaintiffs. This finding is based upon the fact found by the Joint Judge that the plaintiff's father and minor brother are joint with him, by which we understand the Judge to mean that they are members of a joint Hindu family. But from the mere fact that certain persons are members of a joint family it does not necessarily follow that they are partners in a firm which only one of them says is his, unless it was set up with the help of family funds. There is nothing in the judgment of the Joint Judge to show that the

^{(1) (1879) 2} All. 296.

^{(2) (1885) 7} All. 284.

^{(3) (1892) 17} Bom. 413.

^{(4) (1896) 18} All. 198.

^{(5) (1883) 7} Bom. 217.

^{(6) (1881) 6} Cal. 815.

^{(7) (1880) 5} Bom. 38.

^{(8) (1892) 17} Bom. 29.

VADILAL SHAR KHUSHAL. firm was so set up except the statement of the father, which is accepted by the Joint Judge. But, according to that statement, the father lent money to the plaintiff. That would make him a creditor of the firm, not a partner.

Whether the relation of partners exists among two or more persons is a question to be determined with reference to the relation between those actually carrying on the shop business. In the present case the Joint Judge does not hold, nor does he point to any evidence showing, that the persons who he finds are partners with the plaintiff agreed with the latter to combine their property, labour, or skill in the business and to share the profits or losses thereof, or what their relations were. All the Joint Judge finds is that those persons and the plaintiff are members of a joint family. In our opinion it is too broad a proposition of law to lay down that because a person carrying on business is a coparcener in a joint family, therefore all his coparceners are his partners in that business, entitled with him to its rights and responsible with him for its liabilities "Partnership" is defined in section 239 of the Indian Contract Act, and we may further refer the Joint Judge to the observations of Jessel, Master of the Rolls, in Pooley v. Driver, (1) where he says a partnership "is a contract of some kind undoubtedly—a contract, like all contracts, involving the mutual consent of the parties." Participation in the profits of a business is one of the tests for determining whether a person is a partner. It is, as some of the decided cases show (see Ex parte Tennant; In re Howard (2)), "very cogent evidence," but, in the words of James, L.J., in the case just cited (page 309), "that evidence is capable of being controlled by the surrounding circumstances." same case, Cotton, L. J., puts it thus (page 315): "I take it the law is this, that participation in profits is not now conclusive evidence of the existence of a partnership, but it is one of the circumstances, and a very strong one, which are to be taken into consideration for the purpose of seeing whether or not a partnership exists, that is to say, whether there was a joint business, or putting it in another way, whether the parties were carrying on the business as principals

and agents for one another whether it is a joint business or the business of one only." The law is very tersely summed up in one sentence by James, L. J., in Ex parte Delhasse; In re Megevand,(1) where he says that the right to control the property, the right to receive profits, and the liability to share in losses are the elements of partnership. These are all merely indicia which may help the Joint Judge in finding whether a partnership, as defined in the Indian Contract Act, exists. In the present case there is nothing in the judgment of the Joint Judge from which we can gather that these elements existed. He does not deal with the question as to the participation of profits, nor is there any mention of surrounding circumstances. We are left to presume them from the mere fact that the plaintiff is joint with his father and his brother; but just as there is no presumption that a loan contracted by a manager of a Hindu family is for a family purpose (as held in Soiru Padmanabh v. Narayanrao (2)), so there can be no presumption that a business carried on by a coparcener is a family business.

The case must go back, therefore, for a fresh finding on the issue whether there are any other partners in the firm on whose behalf the plaintiff has brought the suit. If at this fresh hearing the District Judge comes to the conclusion that there are other partners, we think that he ought to allow them to be brought on the record. There is no substantial difference between this case and that in Kasturchand v. Sagarmal.(3) There, too, as here, the plaintiff alleged that he was the sole partner. and the Court found he was not. And yet this Court held that the plaint ought to be allowed to be amended. It is true that in that case the plaintiff described himself as the manager of the firm suing, whereas the plaintiff in the present case describes himself as its owner. But that, in our opinion, is not material, for the word "owner" would be a mere surplusage if the suit was intended to be brought, as we have no doubt it was, on behalf and in the interests of the firm. Under section 27 of the Civil Procedure Code the plaintiff is entitled to an amendment.

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We, therefore, reverse the decree and remand the appeal to the District Judge for a fresh decision, having regard to the above remarks. Costs to abide the result.

Decree reversed. Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Batty and Mr. Justice Aston; and on reference before Mr. Justice Chandavarkar.

1902. December 5. BALABAI, LEGAL BEPRESENTATIVE OF DECEASED MAHADEV NARAYAN (ORIGINAL PLAINTIFF), APPELLANT, v. GANESH SHANKAR PANDIT AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), sections 365, 367, 588 clause (18), and 591—Limitation Act (XV of 1877), schedule II, article 1754—Suit to recover possession—Death of the plaintiff pending suit—Legal representative—Practice—Procedure.

On 30th November, 1897, Mahadev Narayan sued to recover certain property from the defendants. He died on the 27th February, 1899, and his niece Balabai (his sister's daughter) applied to be put on the record as his heir and legal representative. It did not appear that the defendants had notice or knowledge of her application, and on the 5th June, 1899, her name was placed on the record under section 365 of the Civil Procedure Code (Act XIV of 1882). In July, 1899, Balabai applied to be allowed to prosecute the suit as a pauper. The defendants opposed this, but took no objection to her right to appear as Mahadev's representative. In August, 1899, the first defendant filed his written statement, in which for the first time he raised the question as to Balabai's right to represent the deceased plaintiff Mahadev. The case subsequently came on for hearing and issues were raised on the pleadings, the first issue being whether Balabai was Mahadev's legal representative. Evidence was taken on all the issues, and the Court found all of them in Balabai's favour, and passed a decree accordingly. The defendant appealed, and the Appellate Court, being of opinion that other issues were unnecessary until the issue as to Balabai's right to represent Mahadev was decided, raised only one issue upon that point. It found that Balabai was not the nearest heir and legal representative of the deceased plaintiff Mahadev. and thereupon it reversed the lower Court's decree and dismissed the suit. On second appeal,

Held, by Chandavarkar and Batty, JJ. (Aston, J., dissenting), reversing the decree and remanding the case for a decision on the merits, that the lower Appellate Court was wrong in going into the question as to Balabai's right to

^{*} Second Appeal No. 34 of 1902.

represent the deceased plaintiff Mahadev and in dismissing the suit on finding that she had no such right.

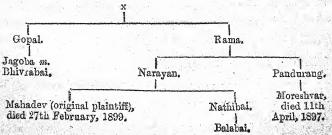
Per Chandavarkar, J.:—The Subordinate Judge acted rightly under section 365 of the Civil Procedure Code (XIV of 1882) in placing Balabai on the record. It was doubtful whether he could afterwards re-open the question and consider it at the hearing under section 367. But assuming that he could, he decided it with the other issues. His decision on that point was an order appealable under clause 18 of section 588. But the defendant did not appeal against that order. He appealed against the whole decree and in his appeal he objected to the order. Under section 591, however, he could, in such case, only object to the order if it affected the decision of the case. It was not shown that the order made by the Subordinate Judge under section 367 had affected the decision of the case. There is no provision in the Code that, if a person claiming as legal representative of a deceased plaintiff fails to prove that he holds that position, the suit must be dismissed. Inasmuch as the defendant had failed to show that the order under section 367 had affected the decision, the lower Appellate Court ought not to have reversed the decree of the Court of first instance.

SECOND appeal from the decision of Ráo Bahádur V. V. Phadke, First Class Subordinate Judge, A. P., at Thána, reversing the decree of E. T. Rego, Subordinate Judge of Bassein.

On the 30th November, 1897, the plaintiff Mahadev Narayan filed this suit as heir of his first cousin Moreshvar Pandurang to recover certain property from defendants.

The defendants were the maternal uncles of Moreshvar Pandurang, who on his death had taken possession of his estate.

On the 27th February, 1899, the suit being then pending, the plaintiff Mahadev Narayan died, and on the 23rd May, 1890, his niece Balabai, the daughter of his sister Nathibai, applied, under section 365 of the Civil Procedure Code (XIV of 1882), as his heiress, to have her name entered on the record as his legal representative. No other application was made, and on the 5th June, 1899, her name was entered on the record. It did not appear that defendants had any notice of Balabai's application. The following table shows the relationship:



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BALABAT v. GANESH. In June, 1899, Balabai applied to be allowed to prosecute the suit as a pauper. Notice was issued to the first defendant and he opposed her application, but he did not then question her right as legal representative of Mahadev. Balabai's application was granted.

On the 8th August, 1899, the first defendant filed his written statement and in it he stated (inter alia) that he did not know whether Balabai was or was not the heir of the deceased Mahadev Narayan.

The suit thus constituted came on for hearing on the 18th August, 1899, before the Subordinate Judge. Issues were raised on the pleadings, the first of which was in the following terms: "Whether the heir-plaintiff Balabai is not the legal representative of deceased plaintiff Mahadev Narayan?" The others related to the merits of the case and are not material to this report.

During the hearing, a witness, Bhivrabai, was examined, who stated that she was the widow of one Jagoba, a paternal cousin of Narayan, the father of the deceased plaintiff Mahadev Narayan. She did not, however, herself set up any claim to the estate of the deceased, or ask to be placed on the record as the legal representative of Mahadev.

On the 31st August, 1900, the Subordinate Judge gave judgment for the plaintiff Balabai. He found on the first issue in her favour, viz., that she was the legal representative of the deceased Mahadev, and he awarded her claim in the suit. In his judgment he said:

There is no record nor evidence to prove that Gopal was the full brother of Rama. On Moreshvar's death his nearest heir was Mahadev, the plaintiff, since deceased. On Mahadev's death his sister's daughter, the only surviving issue in the family, must succeed.

Bhivrabai, as the widow of Jagoba, can have no locus standi. She has not contested for it. If she likes, she may do it hereafter. But she cannot remain silent and allow defendant to devastate everything because he is her sister's husband.

The first defendant appealed, and the first ground of appeal was that the "lower Court had erred in holding that the plaintiff Balabai was the legal representative of the deceased Mahadev Narayan."

The Judge was of opinion that, until that point was decided, it was unnecessary to consider the other grounds of appeal. He accordingly reframed the lower Court's first issue as follows: "Whether plaintiff is the heiress and legal representative of deceased Mahadev Narayan," and reserved the question of other issues until that was decided. He found that issue in the negative and against the plaintiff, being of opinion that Bhivrabai's evidence, which was not contradicted, showed that Balabai was not the heir of the deceased Mahadev. He was of opinion that although Bhivrabai did not herself claim the inheritance, that fact was no ground for awarding it to one who was not the heir. He, therefore, allowed the appeal and reversed the decree of the lower Court.

The plaintiff preferred a second appeal to the High Court. The following points were taken in the memorandum of appeal:

- (1) That the lower Court erred in law in holding that Balabai was not the legal representative of Mahadev Narayan.
- (2) That no one had come forward to oppose Balabai's right to be put on the record, although her name had been substituted on the 5th June, 1899, until at the hearing Bhivrabai's evidence was taken.
- (3) That there was no evidence to prove that Bhivrabai's father-in-law Gopal was brother of Rama, the grandfather of the deceased Mahadev.
- (4) That the lower Court ought not to have gone into the question of Balabai's right to be placed on the record, especially as Bhivrabai was neither a party to the suit nor had she appealed against the order of the Subordinate Judge.

The second appeal was argued before Batty and Aston, JJ.

In the course of the argument the following point, which was not taken in the memorandum of appeal, was raised, viz., whether there had not been a "dispute" in the Court of first instance as to whether Balabai was the legal representative of Mahadey Narayan (the original plaintiff) and whether the Subordinate Judge, instead of proceeding to deal with the suit on the merits. ought not therefore to have followed the procedure prescribed by section 367 of the Civil Procedure Code (XIV of 1882), and have either stayed the suit until the question had been decided or have decided the question at the hearing.

The Judges who heard the second appeal differed in opinion. Batty, J., was of opinion that the decision of the lower Appellate 1903.

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Court was wrong and that the case should be remanded for a decision on the merits. He held that the dismissal of a suit solely because of a doubt as to the heirship of the persons named in the record as the representative of a deceased plaintiff was an error in law; that the merits of the plaintiff's claim (i.e. Mahadev's) could not depend on whether he was properly represented or not; and that the lower Court was mistaken in dismissing the claim on the ground that Balabai had not shown that no one else could proceed with the suit.

Aston, J., on the other hand, held that it was vital to the success of the suit prosecuted by Balabai (after Mahadev's death) that she should be adjudged the nearest heir of Mahadev; that there was nothing to be gained by prosecuting the suit as legal representative of Mahadev, if Balabai was not his nearest heir, in whom alone the property in suit vested; that the lower Appellate Court had found as a fact (which could not be questioned in second appeal) that Balabai was not the nearest heir of Mahadev, and from that finding it followed that she had no right to the property, which never vested in her as legal representative of Mahadev, not being his nearest heir. He was therefore of opinion that the decree of the lower Court should be confirmed.

The following were the judgments delivered:

Batty, J.:—This suit was instituted on 30th November, 1897, by one Mahadev Narayan, to recover possession of certain moveable and immoveable property as the estate of his deceased cousin Moreshvar, whose heir Mahadev Narayan alleged himself to be. The defendants, it was alleged, wrongfully retained possession of that estate.

Mahadev Narayan, the original plaintiff, died during the pendency of the suit, viz., on 27th February, 1899. One Balabai, his sister's daughter, proceeded with the suit and filed a Vakalatnama on 5th June, 1899. The first defendant did not object to Balabai's répresentative character till the 8th August, 1899, but on that day put in a written statement in which he refused to admit that Balabai was the nearest heir to the deceased plaintiff. He advanced, however, no arguments at the time on the point.

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On the 4th July, 1900, the first defendant was examined and appears then to have disputed the right of Balabai to represent the deceased plaintiff Mahadev, though it would seem he admitted his ignorance as to the pedigree of the family and uncertainty as to whether the deceased Mahadev had a cousin named Jagoba.

On the 25th August, 1900, one Bhivrabai, widow of Jagoba, was put forward as the nearest heir to Mahadev, the deceased plaintiff, and was examined as a witness. She is the sister of the first defendant's wife.

The Court of first instance gave judgment on 31st August, 1900, and was of opinion that Bhivrabai had been put forward by the first defendant to assert her right as against Balabai to represent the deceased plaintiff Mahadev Narayan. Bhivrabai claimed that right as widow of Jagoba, a son of one Gopal alleged by her to be the great-uncle of the deceased Mahadev, but the Court of first instance states that there is no record or evidence to prove that Gopal was the full brother of Mahadev's grandfather. Having found on the merits that the claim put forward originally by Mahadev was in the main established, the Court of first instance gave a decree in favour of the plaintiff.

The lower Appellate Court, observing that the first defendant did not admit that Balabai was an heiress of the deceased plaintiff Mahadev, deemed it unnecessary to look into other grounds of appeal, and finding that Bhivrabai was confirmed in her story by her brother and substantially by the first defendant, and that one of the plaintiff's witnesses was unable to say whether Mahadev or Moreshvar's father had any agnatic kin or not, reversed the decree of the lower Court. With reference to the fact that Bhivrabai had not come forward to claim the inheritance, the lower Appellate Court observed that this fact would be no ground for awarding it to one who is not the heir.

Thus the suit instituted by Mahadev Narayan which the lower Court held established, has been rejected by the lower Appellate Court, not because it held the claim insufficiently established, but merely because the person entered on the record as representing the plaintiff had not proved that there was no nearer heir to the plaintiff. The merits of the deceased plaintiff's claim cannot, it

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seems to me, depend on whether that plaintiff has been properly represented or not; and I think, therefore, that the Court was mistaken in dismissing the claim on the ground that the representative had not shown that no one else could be allowed to proceed with the suit. The case would, no doubt, have been different if the suit had originally been instituted by Balabai claiming as heir to Mahadev or to Moreshvar. For, in those circumstances, Balabai would have based her suit on her right as heir, and would have been bound to establish it. But the suit, as instituted, was not based or dependent on Balabai's heirship, and could not properly be dismissed on her failure to prove her heirship. The question of Balabai's right to represent Mahadev was, I think, a question which could only affect the decision as to the person who should be admitted on the record for the purposes of prosecuting the suit, and was not pertinent for the purpose of deciding whether Mahadev's claim should be decreed or rejected.

In the case of the death of a plaintiff, it does not become the duty of the Court in which the suit is pending to decide who is the plaintiff's heir. The procedure is regulated by sections 365, 366 and 367. If the legal representative applies, the Court must enter his name under section 365, and proceed with the suit. If no application be made within the time limited by article 175A of schedule II of the Indian Limitation Act, 1877, there are two courses open, viz., either (a) to pass an order that the suit shall abate, or on defendant applying in this behalf (b) to pass an order for bringing in the legal representative and proceeding with the suit. If the suit abates, section 371 may thereafter come into operation. But the suit is not liable to dismissal. If any dispute arise as to who is the legal representative, section 367 applies. And as held in Subbaya v. Saminadayyar(1) the phrase "any dispute" is wide enough to cover a dispute on that point between the person claiming to represent the deceased plaintiff and the defendant. It need not be between persons claiming to represent the deceased plaintiff. And when such a dispute does arise, it is not the province of the Court to decide who is the rightful heir or to reject the suit altogether on

failure by the person claiming to be representative to establish affirmatively his right as heir. The Court has again two courses open, viz., either to stay the suit until the fact has been determined in another suit, or to decide at or before the hearing of the suit, not whether the person claiming is the heir, but only as to "who shall be admitted to be such legal representative for the purpose of prosecuting the suit." No decision is required or can be passed in such a case on the right of heirship; nor can the suit be dismissed on the ground that such right of heirship has not been established against all possible comers. A decision on that point would not be binding if passed in such a case, even between the rival claimants, and all that is needed and all that can be done in the suit is to decide who shall proceed with it, without in any way affecting the ultimate liability or right of the persons in favour of whom or against whom the order is passed.

It appears to me that a dismissal of the suit solely on the ground of a doubt as to the heirship of a person whose only claim is to proceed with it as the representative of a deceased plaintiff, is an error in law and unsustainable; and that the lower Appellate Court's decree must for that reason be set aside in this appeal.

Had the lower Appellate Court's decision been one under section 367, this Court could not, under section 588, have interfered therewith. But the lower Appellate Court's decision did not purport to be under section 367, nor has the lower Appellate Court given to it the operation of a decision under section 367. It is not as a decision under that section that the decree is liable to be set aside on appeal. The decree is open to objection as one rejecting a suit on a ground which could not justify rejection.

It appears to me immaterial whether objection specifically referring to section 867 was or was not taken in the lower Appellate Court or in the memorandum of appeal to this Court. The procedure adopted was opposed to that laid down in the Code as explained in *Bhikaji* v. *Purshotam*⁽¹⁾ and *Vithu* v. *Bhima*.⁽²⁾ The lower Appellate Court has, it seems, gone no further than to

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decide that Balabai has not succeeded in establishing her right of heirship to Mahadev. It was not necessary for her to do that. It was only necessary to decide who was to be admitted as legal representative for the purpose of prosecuting the suit. If that point be disputed, the onus would not be upon Balabai to disprove any rival claim.

In deciding who should be admitted for the purposes of prosecuting the suit, the Court should, I think, take into consideration the fact that Balabai's name had been more than a year on the record before any rival claimant was suggested; that the rival then put forward was not produced till six days before judgment was delivered; that she (the rival claimant) is the sister-in-law of the defendant; that the defendant, as is to be gathered from the judgment of the Court of first instance, professes no knowledge of the family pedigree; that Balabai had apparently no opportunity of rebutting any evidence adduced as to her rival's relationship; and that the rival herself made no claim to be allowed to proceed with the suit.

The decree of the lower Court should, in my opinion, be reversed, and the case should be sent back to the lower Court in order that the procedure prescribed by the Code may be followed, and that a decision on the merits may be passed in due course. The costs in that case should, I think, abide the result. I understood that the pleaders on both sides accepted this as the only possible solution of the case.

As, however, my learned colleague differs from me, procedure under section 575 of the Code will now be necessary.

ASTON, J.:—There can be no doubt that the substituted plaintiff Balabai, the present appellant, was admitted to the record on 5th June, 1899, to prosecute the suit as legal representative of the deceased original plaintiff; that the suit was then proceeded with as required by section 365 of the Code, no objection being made by the defendants to the suit being so proceeded with (section 32 of the Civil Procedure Code); that the issues framed were the issues on which Balabai went to trial; and the issues decided were an adjudication inter partes.

It was vital to the success of the suit thus prosecuted by Balabai (after Mahadev, original plaintiff, died) that she should be

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adjudicated the nearest heir of Mahadev. There was nothing to be gained by prosecuting the suit as legal representative of Mahadev if Balabai is not his nearest heir, in whom alone the plaint property vested. The defendants did not admit that she is the nearest heir. The first issue in the Court of first instance was treated as covering this question, and that Court decided that Mahadev was the nearest heir of Moreshvar, and Balabai must succeed to Mahadev, without, however, explicitly deciding whether Balabai is the nearest heir of Mahadev. The lower Appellate Court decided inter partes that there is a nearer heir to Mahadev, namely, one Bhivrabai, and that Balabai is not the nearest heir and legal representative. That finding is an adjudication between Balabai (admitted on her own application to prosecute the suit) and the defendants, who suffered her to prosecute the suit but disputed her title to the plaint property, the fact that she is the nearest heir not being admitted (see defendant No. 1's written statement, 8th August, 1899, Exhibit 39). As a finding of fact that Bhivrabai is the widow of a first cousin of Mahadev's father, that finding cannot be contested in this second appeal. On that finding it is now immaterial to inquire whether it was right or wrong to admit Balabai to prosecute the suit as legal representative of Mahadev, for it follows from that finding that she has no right to the plaint property, which never vested in her as legal representative of Mahadev if she is not his nearest heir

I think that Balabai cannot now be allowed to get rid of that finding in the manner sought, so as to give her a fresh opportunity to have the issue tried whether she is the nearest heir of Mahadev. That would, I fear, be an irregularity in procedure more serious than that now alleged (though nowhere set out in the pleading) as to the procedure of the Courts below, which, so far as Chapter XXI of the Code is concerned, was, I think, correct.

My reasons for so holding are stated in detail below.

I think there is no point arising out of the pleadings or taken in the grounds of appeal on which the case can now be remanded for a fresh decision whether Balabai is or is not the legal representative of Mahadev. She was admitted to prosecute

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The original plaintiff in this case was Mahadev Narayan. He died on 27th February, 1899. His deceased sister's daughter, Balabai, claiming to be legal representative of deceased plaintiff, applied within the period of limitation prescribed by law, article 175A, schedule II of the Act (XV of 1877), to have her name entered in place of deceased plaintiff Mahadev (see section 365, Civil Procedure Code), and the Court entered her name on 5th June, 1899, and proceeded with the suit, in accordance with the express direction of the Code, section 365, "and the Court shall thereupon enter his name and proceed with the suit" after such substitution. No application "to be admitted to be such legal representative for the purpose of prosecuting the suit" has been made from beginning to end of the suit by any other The period prescribed by law within which such application under section 365 of the Civil Procedure Code had to be made ended on 27th August, 1899. On 8th August, 1899, the first defendant, in his written statement, declined to admit that Balabai is the nearest heir of Mahadev.

On the 16th August, 1899, an issue was framed "whether the heir-plaintiff Balabai is not the legal representative of deceased plaintiff Mahadev Narayan." Heir-plaintiff is what Balabai styled herself in her application.

Up to the 4th July, 1900, the defendants, who raised this issue, had not suggested the name or existence of any other heir or legal representative of Mahadev, and even on 4th July, 1900, when the first defendant was examined he still declared his ignorance.

On the 25th August, 1900, one Bhivrabai, a sister-in-law of the first defendant, stated in the witness-box that she is the widow of one Jagoba, a first cousin of Mahadev's father. She did not, however, apply to have her name entered on the record in place of the deceased Mahadev, original plaintiff. It was far too late under the law of limitation even if she wished to do so.

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On the 31st August, 1900, the Court of first instance decided inter alia, in disposing of the suit, that Balabai is heir to the property in dispute (and therefore the legal representative of the deceased original plaintiff Mahadev). The Subordinate Judge remarked in his judgment: "On Mahadev's death his sister's daughter, the only surviving issue in the family, must succeed. Bhivrabai as the widow of Jagoba can have no locus standi. She has not contested for it. If she likes she may do it hereafter. But she cannot remain silent and allow defendant to devastate everything because he is her sister's husband."

Though the first issue in the suit was worded as already described, the question was treated as one whether Balabai is the heiress of Mahadev and thus entitled to the plaint property, and it was on this basis that the issue was decided in the affirmative and the claim to the landed property and to part of the cash was awarded.

The first defendant appealed, making Balabai (the substituted plaintiff) and the remaining defendants, respondents in the appeal: and his first ground of appeal was that the first Court erred in holding that Balabai is the legal representative of deceased Mahadev Narayan. The lower Appellate Court, without dealing with other issues in the appeal, framed the issue whether plaintiff is the heiress and legal representative of deceased Mahadev Narayan, and deciding this in the negative reversed the decree of the Court of first instance and dismissed Balabai's suit.

Balabai now appeals to this Court, and her pleader conceded that if Bhivrabai is the widow of a cousin of Mahadev's father, then she is the nearer heiress to Mahadev and excludes Balabai. At first the only position taken by appellant's pleader was that the lower Appellate Court, though it decided that Balabai is not the heiress of Mahadev, had not explicitly said that Bhivrabai is proved to be the heiress.

On that point I think that the lower Appellate Court has said enough to show that it held it proved that Bhivrabai is the widow of Mahadev's father's first cousin. This is the only intelligible conclusion to be drawn from the judgment of the lower Appellate Court. We have here a clear finding of fact,

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But later in the course of the argument a point, not based upon any of the grounds in the memorandum of appeal, was brought forward, that there had been an error in the procedure of the Court of first instance (as to which there was no cross objection in the lower Appellate Court). The point thus taken at the hearing of this second appeal was that there was a "dispute" in the Court of first instance whether Balabai is the legal representative of Mahadev (original plaintiff deceased), and therefore the Subordinate Judge, instead of proceeding with the suit, should have followed the procedure prescribed by section 367 of the Civil Procedure Code, which runs as follows:

If any dispute arise as to who is the legal representative of a deceased plaintiff, the Court may either stay the suit until the fact has been determined in another suit, or decide at or before the hearing of the suit who shall be admitted to be such legal representative for the purpose of prosecuting the suit.

The argument is somewhat elusive, because there were two disputes each of which is sought to be treated as a "dispute" covered by the provisions of section 367, and, secondly, because the wording of the first issue in the Court of first instance diverts attention from the real basis on which that issue was decided, namely, whether Balabai is the heiress of Mahadev.

One of the disputes sought to be treated as covered by section 367 is Bhivrabai's assertion on 25th August, 1900, that she is the widow of a first cousin of Mahadev's father. This assertion was made two years after the period of limitation for applying to have her name substituted for Mahadev's on the record had expired. It was not accompanied by any such application, and the Subordinate Judge's judgment leaves it to be inferred that she was not willing to have her name entered in order to proceed with the suit. If Balabai had not made her own application in time, the suit must have abated. If Balabai had not so applied and the suit had abated (see sections 361-366), then, of course, the suit might have been revived under the conditions set out in section 371; but the suit neither abated nor was dismissed (see section 370) under Chapter XXI, and we are, therefore, not concerned with section 371. I am unable to see

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how as to this part of the case there is such a dispute as is covered by section 367.

Then it is said that the defendants, by raising the issue "whether the heir-plaintiff is not the legal representative of deceased plaintiff Mahadev Narayan," created such a dispute as is covered by the provisions of section 367.

There would be some inconsistency in treating Bhivrabai's assertion of heirship as a denial of the right of Balabai to be treated as legal representative of Mahadev, and in refusing to treat the issue just quoted as bringing in question Balabai's right of heirship. This issue, as already shown, was treated in both the lower Courts as bringing into issue Balabai's right of heirship, and the decision in both Courts was on that basis, though the lower Appellate Court reframed the issue. Balabai's name had already been substituted on the record for Mahadev's, and the defendants did not apply to have it struck off, but were content to let the suit proceed with Balabai as substituted plaintiff, and to go to trial on the issues subsequently framed and recorded. If the defendants had instead asked for Balabai's name to be struck off the record, and the Court had refused such application, then there might have been room for contending that such a dispute is covered by section 367, if that section does not refer merely to rival claimants to be entered as legal representative of a deceased plaintiff. But even then the matter would be only important as to whether there would have been a regular appeal from such refusal or an appeal under section 588, clause 18, read with section 367, rather than an appeal under section 585, clause (2), read with section 32 - where a person has once been admitted to the record as legal representative of a deceased plaintiff that person is a party, and any dispute raised inter partes as to that substituted plaintiff's right of representation (not inheritance) so as to have such substituted plaintiff struck out comes properly under section 32 and not under section 367 of the Code.

If sections 365, 366, 367 are read together I think that they show affirmatively that the dispute contemplated in section 367 is a dispute as to "who shall be admitted to be such legal representative for the purpose of prosecuting the suit." These

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Balabai claimed in her application of 23rd May, 1899, to be heiress of Mahadev, and therefore to be his legal representative, and the question, whether she was heiress of Mahadev, became the main issue in the suit in which the Court on her own application allowed her name to be entered in place of Mahadev.

Section 367 provides that, when a dispute therein contemplated arises, the Court may either stay the suit until the question who is the legal representative has been determined in another suit or decide itself who shall be admitted, &c.; and section 588, clause (18), provides a right of appeal from orders under section 367. But it is difficult to see how such provisions can apply to an issue on the merits framed as between the parties to the suit after a new plaintiff has been admitted as legal representative of a deceased plaintiff to prosecute the suit, and no application is made under section 32.

If, on the other hand, the "dispute" meant in the argument is the belated assertion of Bhivrabai, how could the Court deal with such an assertion on a dispute under section 367 when Bhivrabai's name even did not transpire till two years after any application of hers to be entered on the record, even if made, must have been at once rejected as time-barred?

I do not think that the words "for the purpose of prosecuting the suit," or any other words in section 367, prevent the issue whether Balabai is the nearest heir of Mahadev being adjudicated in the present case which she has been allowed to prosecute upon to this Court.

The cases Bhikaji v. Purshotam⁽¹⁾ and Fithu v. Bhima⁽²⁾ do not say that a dispute within the meaning of section 267 need not be between persons claiming to represent the deceased plaintiff. In the Madras case, Subbayya v. Saminadayyar, ⁽³⁾ this was said. But if that case be examined, it will be seen that the dispute was between an alleged adopted son who claimed

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to have his name substituted for a deceased plaintiff, and on the other side a defendant who claimed that the right to sue did not survive as the deceased plaintiff's share had passed to defendant by survivorship. The District Munsiff refused the application of the adopted son to have his name entered, holding that the right to sue had not survived. The District Judge concurred, and held that no appeal lay against an order that the right to sue had not survived (section 365 allowing such applications for substitution of names only where the right to sue survives). The Madras High Court decided that an adopted son is the legal representative of the persons to whom he is adopted, and section 371 would prevent the institution by him of any fresh suit, and treated the order of the Munsiff as an order within the meaning of section 367.

In that case up to the stage of second appeal the adopted son had not been made a substituted plaintiff, and there had been no adjudication *inter partes* that the adopted son was not the heir to the property in dispute.

If the Madras case, Subbayya v. Saminadayyar, (1) be compared with the Bombay case, Bhikaji v. Purshotam, (2) it will be found that in both there was a refusal to substitute the name of a son. adopted in the former and a minor in the latter case, in place of a deceased plaintiff, and an order was made under section 366, Civil Procedure Code, for abatement of the suit. The Madras High Court ruled that the adopted son had a right of appeal by treating the matter as a dispute within the meaning of section 367. The Bombay High Court did not suggest that section 367 could be used so as to give the claimant plaintiff a right of appeal by reference to section 367, but treated the order under section 366 as virtually a decree within the meaning of section 2 of the Civil Procedure Code, and, therefore, held that there was a right So far, therefore, the Madras decision is at variance of appeal. with the above quoted decision of this Court.

In the case of *Eshen Chunder* v. *Shamachurn*, (3) Lord Westbury, who delivered the judgment, said: "This case is one of considerable importance, and their Lordships desire to take advantage

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Throughout the pleadings in all three Courts there is no suggestion that there was any irregularity in procedure, far less that there was any such error prejudicing the appellant Balabai. Mahadev instituted the suit to recover certain property claiming it as heir of one Moreshvar, deceased. When Mahadev died, then Balabai claiming to be heiress of Mahadev applied, calling herself "heir-plaintiff," on 23rd May, 1899, within the period of limitation prescribed, to have her name substituted for Mahadev's as plaintiff. Her application was granted ex parte on 5th June, 1899, and ever since she has remained on the record as substituted plaintiff. one else has ever applied to prosecute the suit and any such application has long ago become barred by the law of limitation. The defendants could have applied under the second paragraph of section 366 to have any nearer heir substituted, but did not so apply, and any such application is now long since barred by the law of limitation. The defendants could presumably have asked under section 32 of the Civil Procedure Code for Balabai's name to be struck off if she is not the legal representative of Mahadev. but they never did this. On the 8th August, 1899, the defendant No. 1 filed this written statement, saving he did not know whether Balabai is the nearest heir or not of Mahadey and did not admit that she was, and the suit proceeded and Balabai has remained on the record as substituted plaintiff ever since.

The defendants suffered her to prosecute the suit and were content that the suit should proceed with Balabai as substituted plaintiff. They cannot now say that the suit should not have been proceeded with with Balabai as plaintiff. Balabai cannot now say, after she has been substituted as plaintiff on her own application, and has prosecuted the suit as plaintiff, that the Subordinate Judge should have held some sort of proceeding to ascertain if she is the legal representative of Mahadev, or should have stayed the suit under section 367 merely because the

defendant did not admit that she was the nearest heir of Mahadev. The defendants apparently conceded that Mahadev was the heir of Moreshvar and that the estate of Moreshvar would go to the nearest heir of Mahadev.

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Though the first and main issue on which the plaintiff Balabai and the defendant went to trial was worded as already set out, it was evidently understood by the parties, and was treated, as raising the question whether Balabai is the nearest heir of Mahadev. In that sense this issue was decided in the Court of first instance in favour of Balabai. In the lower Appellate Court it was decided that there is a nearer heir of Mahadev, one Bhivrabai. It is conceded by Balabai's pleader that if Bhivrabai is the widow of the first cousin of Mahadev's father, then she is a nearer heir to Mahadev than Balabai. But this is what the lower Appellate Court has decided, that Bhivrabai is, and Balabai is bound by that finding of fact. As Balabai is, according to this finding, a more distant heir than Bhivrabai, the cause of action did not survive to Balabai, and it matters not whether she is the legal representative of Mahadev or not, if the plaint property never vested in her. In order to succeed in this suit Balabai had to prove that she is the nearest heir of Mahadev. This was a question on which the parties to the record went to trial, and I think that it was open to both the Courts below to decide the suit on this issue. It is difficult to see what can be gained by sending the case back in order that this issue, vital to the success of Balabai in this case, may be converted in either of the lower Courts into a question whether Balabai's name as substituted plaintiff should be struck off the record. There seems to be ground for holding that this cannot be done and ought not to be done at this stage of the case, even if it were not sacrificing substance to mere form.

Looking to the finding of fact recorded by the lower Appellate Court, I would confirm the decree appealed against. If the contention is that Balabai must succeed in this case if she is the legal representative of Mahadev, though not his heir, I think for the reasons already stated, on the authority of the Privy Council decision in Eshen Chunder v. Shamachurn (1) already cited.

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that this plea, which was nowhere taken in the lower Courts or in the grounds of appeal to this Court, cannot now be entertained.

Treating the contention on the merits, I see no substance in it, when the mere admission to prosecute a suit as legal representative does not give a right to the relief sued for. If Balabai is not the nearest heir, then the property of Mahadev has never vested in her even though she be allowed to sue as his legal representative. Moreover, it follows from the lower Appellate Court's finding on the facts that she is not the legal representative of Mahadev. Her claim to be his legal representative was based on her assertion of heirship as niece. She was admitted to prosecute the suit, and the main issue on which she went to trial was really whether she is the nearest heir. The result is an adjudication inter partes that one Bhivrabai, a nearer heir, exists and that Balabai is neither next heir nor legal representative of Mahadev.

Owing to the above difference of opinion, the case was referred to Chandavarkar, J., under section 575 of the Civil Procedure Code (Act XIV of 1882).

Silaram S. Patkar for the appellant Balabai (plaintiff):—It is clear that Balabai, as the daughter of Mahadev's sister, is Mahadev's heir: Mayne's Hindu Law, page 700. The defendant has no title to it at all.

But apart from the question of Balabai's right, we submit that the lower Appellate Court was wrong in raising the question and dismissing the suit. Balabai had been placed on the record under section 365, Civil Procedure Code (XIV of 1882), on her application. No other person has ever applied to represent the deceased Mahadev. Bhivrabæi, no doubt, at the hearing in the Court of first instance, stated that she was the widow of Jagoba, the first cousin of Mahadev's father. But she did not claim to represent Mahadev in the suit. The lower Appellate Court has dismissed the suit, because in its opinion Balabai had not proved she was the nearest heir of the plaintiff Mahadev. But that was not the question at the hearing. The suit was brought by Mahadev, and Balabai had been placed on the record after his death to represent him. No appeal was made against the order placing her on the record, under section 588, clause (18), of the

Civil Procedure Code (Act XIV of 1882). The suit was decided on the merits by the first Court, and in appeal against that decree no objection could be taken against the order placing Balabai on the record, unless it could be shown that the order affected the decision of the case: see section 591, Civil Procedure Code (XIV of 1882). That was not shown: Sankali v. Murlidhar. (1) The procedure of the lower Court was wrong: Bhikaji v. Purshotam (2): Vithu v. Bhima. (3)

Gangaram B. Rele for respondent (defendant 1):—A sister's son is a bandhu, and even as such he cannot inherit unless all the sapindas are exhausted. A sister's daughter is not even a bandhu and is not an heir: West and Bühler, page 476. Balabai is not, therefore, Mahadev's heir. Bhivrabai is the widow of Jagoba, who was a gotraja of the deceased Mahadev. Bhivrabai is, therefore, also a gotraja, and would exclude a bandhu and much more one who is not a bandhu.

If, then, Balabai did not inherit Mahadev's property, she had no right to represent him. She is not the rightful owner. The defendants are in possession and are entitled to hold it against every one but the rightful owner.

We had no notice of the order placing Balabai on the record and so we could not appeal against it. We questioned her right in our written statement, and when we appealed against the decree we objected to the order.

CHANDAVARKAE, J.:—The facts, which are necessary for the determination of the question on which Batty and Aston, JJ., have differed, are not disputed, and are shortly as follows:

The suit was brought by Mahadev as the cousin of Moreshvar to recover certain property from the defendants. The plaint was filed on the 30th of November, 1897. On the 11th of November, 1898, defendant No. 1 applied for and obtained time to put in his written statement. In the meanwhile, i.e. on the 27th of February, 1899, the plaintiff Mahadev died. The present appellant, Balabai, applied on the 23rd of May, 1899,

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under section 365 of the Civil Procedure Code, to have her name entered on the record in place of the deceased as his legal representative. She was brought on the record on the 5th of June, 1899, without, apparently, any notice to the defendant or knowledge on his part. On the 12th of July, 1899, the pleader of defendant No. 1 put in a purshis, stating that Balabai should not be allowed to prosecute the suit in forma pauperis. No question was then raised disputing her right as the legal representative of the deceased.

On the 8th of August, 1899, defendant No. 1 put in his written statement, in which for the first time he stated that he did not know whether Balabai was the heiress of the deceased plaintiff Mahadev, as alleged by her. Issues were raised on the 16th of August, 1899, and the first issue was "whether the heirplaintiff Balabai is not the legal representative of deceased plaintiff Mahadev Narayan." Evidence was taken on that as well as the other issues, and the Subordinate Judge, in the Court of first instance, finding all the issues in favour of the plaintiff, gave Balabai a decree entitling her to recover possession of the property in dispute from defendant No. 1, and awarding her costs from defendant No. 1 personally and from the estate of defendant No. 2, deceased. The Subordinate Judge, in recording a finding in Balabai's favour on the first issue which related to her representative character, said:

Now as regards plaintiff's heirship, defendant 1, the chief opponent, has no knowledge of the heirs of the deceased Moreshvar. Still he denies plaintiff's right. No person has come forward to oppose plaintiff's right or to be added as co-plaintiff, though the suit has been pending for three years. Even witness Bhivrabai, who is put forward as the nearest heir, did not come forward to give her evidence or to put her claim till the last day. It is a wonder how she was cited, if defendant 1 did not know her pedigree or that of Moreshvar. Her sister is given in marriage to defendant 1. He, therefore, must have put her up.

From this decree the first defendant appealed to the District Court at Thána. The appeal was heard before Ráo Bahádur V. V. Phadke, Subordinate Judge with Appellate Powers, and he raised only one issue reserving others. The only issue raised was "whether plaintiff is the heiress and legal representative of deceased Mahadev Narayan." On that issue he held in the negative and rejected the suit.

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The question is "whether the lower Appellate Court could go into the question as to the representative character of Balabai and reject the suit on finding that she did not hold that character." The determination of that question depends on sections 365, 367 and 591 of the Code of Civil Procedure. Under section 365, where a sole plaintiff dies, his legal representative, where the right to sue survives, may apply to the Court, and the Court shall thereupon enter his name and proceed with the suit. The duty of entering the name and proceeding with the suit is imposed on the Court in imperative terms by this section, only where the person is either admitted to be the legal representative of the deceased or where no dispute is raised as to his representative character. Here, when the application was made by Balabai, it is true there was no admission of her claim. Nor

It does not appear, however, that when the name was so entered, the first defendant had any notice of Balabai's application. From the roznama it appears that when the case was called on on the 24th of March, 1899, it was adjourned to the 26th of June, but before that, viz., on the 5th of June, Balabai made her application to be put on the record as the deceased plaintiff's legal representative, and the Court granted the application. This must be presumed to have been done without any notice to and behind the back of the first defendant, because, as I have said, there is nothing to show that the defendant had notice of Balabai's application. When the Court ordered her name to be entered on the record, without notice to the defendant, it was the act of the Court. But "an act of the Court shall prejudice no man" (Moor v. Roberts⁽¹⁾), and the defendant had a right to question that act in proper time.

was there any question raised then disputing it, and the Court

entered her name on the record.

But when after that, the case was taken up on the 26th of June, 1899, then at least the first defendant had intimation of Balabai's claim, as appears from the *roznama*. Notice was ordered to issue to him why Balabai should not be allowed to prosecute the suit as a pauper. He raised no dispute as to her right to prosecute the suit as the legal representative of the deceased plaintiff. Neither

Palabai v. Ganesii. on the 26th of June, 1899, nor on the 12th of July, 1899, when the suit was taken up, did he deny Balabai's right as the heiress and legal representative of the deceased plaintiff, and the Court passed an order in the presence of the pleaders of the parties allowing Balabai to prosecute the suit in forma pauperis.

From this statement of facts, which appear from the roznama, it is clear that the Court was right in acting under section 365 of the Code in entering Balabai's name on the record. Whatever error it had committed in the beginning was waived by the defendant's conduct, and the act of the Court stood complete so as to fall properly within the requirements of that section. "When there is no dispute as to the applicant being the legal representative, the procedure prescribed by section 365 is to be followed" (Muttuswami Ayyar, J., in Oula v. Beepatheen). That procedure was substantially followed here. Having acted under that section, the Court was bound under it to proceed with the suit.

What the Subordinate Judge did, however, subsequently was this. After the suit had been called on and adjourned on several dates, it was taken up on the 8th of August, 1899, when the first defendant put in his written statement, in which he substantially denied for the first time Balabai's right to prosecute the suit as the legal representative of the deceased plaintiff. The Subordinate Judge raised issues, the first of which was in these terms: "Whether the heir-plaintiff Balabai is not the legal representative of deceased plaintiff Mahadev Narayan."

The circumstances under which this issue was raised are noted as follows in the roznama:

In the event of a dispute being raised by the defendant that plaintiff Balabai is not the legal representative of the deceased plaintiff Mahadev Narayan, but that some other person is the legal representative, it was necessary to decide that question before raising the issues. Therefore the suit was adjourned to this date for the purpose of raising issues, and for hearing. But no such dispute having proceeded from the defendant, there is no reason left for making any inquiry before the raising of the issues. Therefore the issues are raised to-day, 16th August, 1899.

This endorsement made in the roznama is rather obscurely

worded. It is not quite clear what the Subordinate Judge meant: whether he meant to hold that, because the defendant had not raised the dispute before the raising of the issues, he must be taken to have admitted Balabai's right to prosecute the suit as the deceased plaintiff Mahadev's legal representative and the suit must be heard on the merits, or whether he meant that although no inquiry as to Balabai's right had been held before the raising of the issues—i. e., before the case came on for hearing—because the defendant had not raised any dispute, yet, as he raised a dispute at the hearing, the inquiry as to it should take place with the inquiry on the merits. I construe the endorsement to mean the latter. In my opinion the Subordinate Judge intended to proceed under section 367 of the Code.

It is urged, however, that the Subordinate Judge did not proceed and could not have intended to proceed under section 367 when he raised his first issue, bringing into controversy Balabai's right to prosecute the suit as the deceased plaintiff Mahadev's heir and legal representative. In support of this argument I am asked to take notice of what the Subordinate Judge actually did. He had entered Balabai's name on the record under section 365; he raised the issue after the defendant had put in his written statement; he did not decide it at or before the hearing; but as a matter of fact having raised it with other issues which related to the proper merits of the suit itself, he decided it with them. I am asked to infer from all this that the first issue was raised simply because the Subordinate Judge and the parties intended to make the question of Balabai's heirship a question on the merits, and not a preliminary question under section 367. I cannot, however, read the terms of the endorsement in that way. The date on which the endorsement was made had been fixed for the raising of issues. The Subordinate Judge says that it had been so fixed with a view to decide in the meantime the question of Balabai's right as the heir and legal representative in case the defendant should raise it. The defendant, however, did not raise the question till the case was taken up on the date fixed for issues. Therefore, the Subordinate Judge thought it was of no use adjourning the case for the issues and making an inquiry into the question beforehand, but that the two might go together.

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That is the construction I put upon the endorsement. Moreover, if I can attribute the action taken by the Subordinate Judge to some section in the Code, I ought to so attribute it instead of speculating about it and ascribing it to something not warranted expressly by the Code. The question of Balabai's right to come in as the heir and legal representative of the deceased plaintiff could be dealt with, according to the Code, either under section 365 or under section 367. The Subordinate Judge had dealt with it at first under section 365, under the impression, which was of course correct as matters then stood, that there was no dispute. But at the hearing a dispute was raised and he raised an issue on it. That could bring the question under section 367 and no other. It is true the Subordinate Judge did not decide the question at or before the hearing as required by that section: that, however, was only an error in procedure, and a mere error in the procedure prescribed by a section does not justify the conclusion that the Court did not act or purport to act under it, if it is only under that section that the Court could act. There is no other section which gave the Subordinate Judge jurisdiction to try the question, and treat it as part of the merits of the suit.

It should be borne in mind that the Legislature has studiously provided a special procedure for certain questions which arise in connection with a suit where those questions are only preliminary stages in its determination. The object evidently was to prevent such questions from embarrassing the proper merits of the suit itself. When a plaintiff dies, the suit cannot proceed because there is none suing. The Legislature provides that his legal representative can come in his place; when he is allowed to come. the defect is made up, and there is a suit to proceed. The suit is then a suit on the merits. A Court has no jurisdiction after that stage has been reached to go back and inquire into the right of the legal representative to proceed with the suit side by side with an inquiry into the merits. Such twofold inquiry is bad, because the Court proceeds in that case with the suit when there is no one suing or allowed to sue. The contention urged before me, that in this case Balabai was formally put on the record under section 365, but that the Court and the parties left her right to be determined in the suit itself, is opposed to the very scheme of the Code of Civil Procedure. If the Court and the parties acted contrary to the Code, and if the irregularity was cured by the consent of the parties, it could only be cured to this extent, that

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the Court must be taken to have exercised jurisdiction under section 367 if not under section 365. I can see no valid ground for holding that the Court could treat the preliminary issue (without the determination of which there was no suit to proceed and the suit could not proceed under the Code) as an issue on the merits of the suit and not under section 367. There is nothing in the case to show that the parties asked the Court to treat that issue as a suit on the merits; and the mere fact that it was raised with the issues on the merits is not, I think, sufficient to take it out of the category within which the Code of Civil Procedure clearly says it should fall.

As, however, the Subordinate Judge had already entered Balabai's name on the record under section 365 and as the defendant had not questioned that order at the earliest opportunity. when he could have questioned it, his jurisdiction was exhausted and the subsequent action taken under section 367 is open to question. But assuming that in allowing the question to be reopened at the hearing the Subordinate Judge acted rightly, he was in error in not conforming to the provisions of section 367 which require that the dispute referred to in it should be decided at or before the hearing. Here the Subordinate Judge tried the issue under section 367 with the issues on the merits of the suit and disposed of them all together in favour of the plaintiff. So far as he decided the issue under section 367, the decision was an order appealable under clause 18 of section 588 of the Code. The defendant could have appealed and got it set aside, if he had proceeded under that clause; but, instead of appealing against the order only, he appealed against the decree passed by the Subordinate Judge and it was on that appeal that he questioned the order passed under section 367. Section 591, however, lavs down the limits of the right of an appellant to question such an order. He can question it only on the ground of "any error. defect or irregularity in any such order affecting the decision of the case." In Sankali v. Murlidhar (1) the Allahabad High Court interpreted the section to mean that the error, defect, or irregularity should be in procedure or in law, not in matters

BALABAI v. Ganesii. of fact; and that even then, i.e. where there is any defect, &c., in procedure or in law, it should be such as to affect the decision of the case. There was, no doubt, an error in procedure so far that the Subordinate Judge did not pass the order under section 367 as required by that section, but dealt with the question of Balabai's right to be treated as the heir and legal representative of the deceased plaintiff along with the questions affecting the suit on its merits. But has that erroneous procedure affected the decision of the case? The argument urged before me by Mr. Rele for the respondent was that it did affect the decision of the case, inasmuch as, if Balabai was not the legal representative, the suit should be dismissed. But there is no provision in the Code which says that a suit should be dismissed, if a person claiming as the legal representative of the deceased plaintiff in it fails to prove that claim. The question of the dismissal of the suit stands on different considerations altogether, according to the Code. If no person comes forward and applies to be put on the record within the period prescribed by law after the plaintiff's death, the Court has to proceed under section 366. There is no other ground urged to show that the erroneous procedure observed by the Subordinate Judge in passing the order under section 367 affected the decision of the case. The evidence taken as to the merits of the suit, i.e. as to the deceased plaintiff Mahadev's right to the property, was considered by the Subordinate Judge apart from the evidence as to Balabai's right to be treated as his legal representative. It cannot be said, then, that the latter evidence influenced the decision of the case on the merits of the suit.

Under these circumstances I am of opinion that the Subordinate Judge with Appellate Powers committed an error in law in reversing the Subordinate Judge's decree and dismissing the suit on the ground that Balabai was not the heiress and legal representative of the deceased plaintiff Mahadev.

I reverse the decree of the lower Appellate Court and remand the case for a decision by the lower Appellate Court on the merits. Costs to abide the result.

ORIGINAL CIVIL.

Before Mr. Justice Tyabji.

JEHANGIR M. CURSETJI, PLAINTIFF, v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, DEFENDANT.*

1902. Dec. 8 and 9.

Jurisdiction—Defamation in Government Resolution—Secretary of State, liability of, to be sued—Governor and Members of Council, liability of—Act of State—Government servants, powers of Government over—Liability to be dismissed or censured—Discovery—Privilege—Privileged document—Official communication absolutely privileged—Notice of suit, what is sufficient—Civil Procedure Code (Act XIV of 1882), sections 416 and 424.

The plaintiff, who was Huzur Deputy Collector of Poona and as such exercised magisterial and revenue functions, sued the Secretary of State for India in Council for defamation. The alleged defamation was contained in a Resolution of the Bombay Government dated the 6th November, 1899, which, after reciting the substance of certain papers which had been laid before Government, stated that, after careful consideration of the facts disclosed in those papers and of the explanation tendered by the plaintiff, the Governor in Council had "come to the conclusion that the plaintiff had been guilty of misconduct reflecting gravely on his reputation for honesty and trustworthiness." The Resolution then set forth the penalties inflicted in respect of the said misconduct. The defendant (inter alia) contended that the suit was not maintainable.

Held, that the Court had no jurisdiction and that the suit was not maintainable on the following grounds:

- (1) The Governor of Bombay and Members of Council are by statute exempt from the jurisdiction of the High-Court so far as acts done in their public capacity are concerned. That being so, no action lies against the Secretary of State for India in Council in respect of such acts of the Governor and Members of Council.
- (2) The Secretary of State can only be sued in respect of those matters for which the East India Company could have been sued, viz., matters for which private individuals or trading corporations could have been sued or in regard to those matters for which there is express statutory provision. No suit would lie against the East India Company in respect of acts of state or acts of sovereignty, and therefore no suit in respect of such acts lies against the Secretary of State in Council.
- (3) The plaintiff was a public officer, whose employment was one which could only be given to him by the Sovereign or the agents of the Sovereign. Such public servants hold their offices at the pleasure of the Sovereign and are liable.

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to dismissal at his will and pleasure, if the power of dismissal is not limited by statutory provision. The power of dismissal includes all other powers (e.g. of reduction or censure). It is open to Government by Resolution or otherwise to censure or reprimand an officer.

(4) The Resolution complained of by the plaintiff being an official communication was absolutely privileged. It could not be put in evidence or produced in Court and no secondary evidence of it could be given. In respect of such official communications no allegation of malice is allowed and no proof of malice takes away the privilege. No action, therefore, could be based on any libel, however malicious, contained in the Resolution.

It was contended for the defendant that the notice of action given by the plaintiff under section 424 of the Civil Procedure Code (Act XIV of 1882) was insufficient, inasmuch as it did not allege malice, while in his plaint the plaintiff charged malice against the officers of Government who were parties to the issue of the Resolution.

Held, that the notice was sufficient. Such a notice is sufficient if it substantially fulfils its object in informing the parties concerned generally of the nature of the suit intended to be filed.

Suit for damages for defamation.

The plaintiff was a member of the Provincial Civil Service of the Bombay Presidency, and in 1899 occupied the position of fourth grade Deputy Collector of Poona in charge of the treasury.

The defamation he complained of was contained in a Government Resolution (No. 7846) dated the 6th November, 1899, which, after reciting the substance of certain papers which had been laid before Government, stated that, after careful consideration of the facts disclosed in these papers and of the explanation tendered by Mr. Cursetji (the plaintiff), the Governor in Council had come to the conclusion that that officer had been guilty of misconduct reflecting gravely on his reputation for honesty and trustworthiness. The Resolution then set forth the penalties inflicted in respect of the said misconduct of the plaintiff.

The Resolution as set forth in the plaint was as follows:

Official conduct—
Mr. J. M. Cursetji, Huzur Deputy
Collector, Poona.

No. 7846.

REVENUE DEPARTMENT.

Bombay Castle, 6th November, 1899.

Memorandum from the Commissioner, C. D., Confidential, No. 100, dated 16th August, 1899—Submitting a letter, No. 108, dated 1st idem, from the District

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Magistrate, Poona, who brings to notice the conduct of Khán Bahádur J. M. Cursetji, Huzur Deputy Collector, Poona, in connection with the trial of a case arising in the Ambegaon Petha of that district, which, though referred to the Police for inquiry and reported by them as false, was nevertheless heard by Mr. Cursetji; states that the hearing was prolonged for over $3\frac{1}{2}$ months and that the result was merely a confirmation of the original report received from the Police; observes that after the case was heard on various days the Magistrate was invited by the parties to proceed to the scene of the alleged offence, and that Mr. Cursetji arranged to do so on condition that the cost of his conveyance was paid by the accused and that of his clerk by the complainant's pleader; and adds that the impropriety of Mr. Cursetji's conduct is most seriously aggravated by the fact that shortly afterwards he preferred a bill claiming travelling allowance for the very same journey and also allowed his clerk to do the same.

Letter from the Commissioner, C. D., No. Confidential—120, dated 30th August, 1899.

Memorandum from the Commissioner, C. D., No. Confidential—124, dated 7th September, 1899.

RESOLUTION.—After careful consideration of the painful facts disclosed in these papers and of the explanations tendered by Mr. Cursetji, the Governor in Council has come to the conclusion that that officer has been guilty of misconduct reflecting gravely on his reputation for honesty and trustworthiness in the following respects:

- (1) Improperly requiring the accused person in a criminal case conducted by him (Mr. Cursetji) in his Magisterial capacity to pay for the conveyance of himself and the complainant in the same case to pay for the conveyance of his clerk Bhange to the scene of the offence alleged to have been committed by the said accused, namely, to the village of Wachpe, distant some 59 miles from Poona, and back, and in receiving himself from the defendant the sum of Rs. 25 and in permitting his clerk Bhange to receive from the complainant the sum of Rs. 16-12-0 in respect of the said expenses of conveyance.
- (2) In having after receipt of the said expenses improperly drawn bills upon Government and obtained from the treasury the sum of Rs. 29-8-0 for himself and permitted his clerk to obtain Rs. 14-12-0 in respect of the same journey.
- (3) Entering incorrect dates in his own travelling allowance bill in order to prevent objection being raised in audit to the drawing by him of mileage allowance on at least one of the days on which he travelled.
- (4) In connection with the travelling allowance bill of the clerk Bhange deliberately signing certificates which he knew to be false.
- 2. As regards the first and second charges, Mr. Cursetji's defence is simply a denial of the impropriety alleged. Such a defence will not bear even the most slender examination. The impropriety of taking money on any pretext whatever from parties to a Magisterial case under inquiry before him must be patent to any officer called upon to discharge Magisterial duties. As an experienced Account Officer, Mr. Cursetji must be intimately conversant with Articles 1086

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and 1087 of the Civil Service Regulations and fully aware therefore that he was not entitled himself to make or to allow his clerk to make travelling allowance a source of profit.

- 3. As regards the third charge, Mr. Cursetji asserts that the erroneous dates were signed to by him through inadvertence. The fact that the errors resulted to his advantage, conjoined with the other discreditable circumstances of the case, throws grave doubts on the credibility of this defence. It was also Mr. Cursetji's clear duty, as he must have been fully conscious, to be scrupulously careful that the entries of dates on which he travelled were absolutely accurate.
- 4. As regards the fourth charge, it is shown that Mr. Cursetji certified (1) that the amount entered in the clerk's travelling allowance bill (Rs. 14-12-0) did not exceed his actual travelling expenses and (2) that these expenses were Rs. 16-12-0, whereas Mr. Cursetji knew as a matter of fact that the clerk's expenses were nil, that he paid nothing for the tonga mentioned in the bill, and that he was conveyed free of cost to Wachpe and back by the complainant in the case. Mr. Cursetji thus actively abetted his clerk in committing a fraud on Government by passing a bill and signing statements which to his knowledge were false. His defence to these charges, that he signed the certificates by inadvertence and believed on the assurance of his clerk and office that the charges were justifiable, can only be characterised as puerile and incredible.
- 5. The above four charges having been found proved against Mr. Cursetji, it has to be decided what notice should be taken of his misconduct. The Governor in Council has most seriously considered whether the case would be met by any punishment short of dismissal and has been mainly induced by consideration of Mr. Cursetji's length of service (22½ years) and by compassion for those who are dependent on him to limit his award to the following penalties:
 - (1) The reduction of Mr. Cursetji to the sixth grade of Deputy Collectors.
 - (2) The stoppage of all further promotion for him.
 - (3) His compulsory retirement at the age of 55.
- (4) The refund of the amount of traveiling allowance fraudulently drawn by him.
- 6. The question whether Mr. Cursetji should be permitted to retain Magisterial powers should be referred to the Judicial Department, with the intimation that having regard to the facts proved under the first charge and the allegations, if they be considered proved, of his general conduct of the case dealt with in these papers, and also bearing in mind previous occasions on which his conduct and competency as Magistrate have been called in question, Government in the Revenue Department entertain grave doubts whether he should be any longer entrusted with the exercise of Magisterial powers.
- 7. The Collector of Poona should deal with the case of the clerk Bhange, requiring him to refund the sum of Rs. 14-12-0 wrongfully drawn by him on account of travelling allowance and passing such other orders as he may deem fit.

(Signed) J. W. P. Muir-Mackenzie,
Secretary to Government.

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The plaint stated that the plaintiff had received the above Resolution through the Collector of Poona, his then immediate superior, on the 15th November, and that he (the plaintiff) at once requested Government to supply him with copies of "all reports, petitions and other documents on which Government had passed the said Resolution," but that Government by a subsequent Resolution (No. 9032) dated the 16th December, 1899, declared this request to be inadmissible.

The plaint further stated that the plaintiff had applied to the Government of Bombay for a reconsideration of his case, but that the Government had refused his application.

The plaint then charged as follows:

- 7. The plaintiff says that the Government of Bombay by their said Resolution, No. 7846 of 6th November, 1899, falsely and maliciously published of and concerning the plaintiff a false and defamatory libel, in that the said Resolution imputes dishonesty and fraud to the plaintiff, who is a public officer, and is made the means of promulgating defamatory and malicious allegations not warranted by the occasion or the circumstances of the case, and exceeds the limit of just comment and, besides, contains misstatements showing a reckless indifference as to whether the facts published were true or false.
- 8. In conformity with the provisions of section 424 of the Civil Procedure Code, the plaintiff on the 4th day of September, 1900, caused a notice in the terms required by such section to be delivered to the Chief Secretary to the Government of Bombay.

The prayer of the plaint was for-

- (a) judgment for the sum of Rs. 1,50,000 as damages sustained by the said wrongful act of the Government of Bombay;
- (b) that the said Government Resolution No. 7846 of 6th November, 1899, may be ordered to be set aside.

The notice of action given to Government by the plaintiff under section 424 of the Civil Procedure Code (XIV of 1882), after stating the various steps taken by the plaintiff to obtain redress, stated as follows:

5. I have, therefore, in order to avoid the bar of limitation under section 424 of Act XIV of 1882 (the Civil Procedure Code), to give you notice that in the event of my being so unfortunate as to fail to secure justice at the hands of the Government of Bombay and of India, I shall file an action against the Secretary of State for India in Council for (a) cancellation of Government Resolution No. 7846 of 6th November last, and (b) for loss of character, as I am advised that the following words in the said Resolution are libellous:

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- (1) 'That officer has been guilty of misconduct reflecting gravely on his reputation for honesty and trustworthiness' in respect of my official conduct, the subject-matter of the said Resolution.
- (2) 'Conjoined with the other discreditable circumstances of the case, throws grave doubt on the credibility of the defence.'
- (3) 'Mr. Cursetji thus actively abetted his clerk in committing a fraud on Government by passing a bill and signing statements which to his knowledge were false.'
- (4) 'The refund of the amount of travelling allowance fraudulently drawn by him.'

The written statement of the defendant was as follows:

- 1. The defendant says that the Resolution No. 7846 of the 6th November, 1899, set out in the plaint was an act and order of the Governor of Bombay and Council, counselled, ordered and done by the said Governor and Council in their public capacity only and acting as Governor and Council, and that by virtue of the provisions of the Statute 4 Geo. IV, c. 71, the said Governor and Council are not subject to the jurisdiction of this Honourable Court by reason of such act and order.
- 2. The defendant also says that apart from the provisions of the said statute no suit is maintainable against him in respect of the said Resolution, inasmuch as the same was issued and published by the Governor of Bombay and Council acting in their public capacity as the Executive Government on behalf of Her late Majesty the Queen-Empress.
- 3. The defendant submits that the allegations in the plaint contained, and particularly those in the seventh paragraph thereof, disclose no cause of action against him or the Government of Bombay.
- 4. The defendant further says that the statements contained in the said Resolution are privileged.
- 5. The defendant says that the notice of action referred to in the eighth paragraph of the plaint is confined to a charge of alleged libel contained in four sentences from the said Resolution and contains no intimation of the plaintiff's intention to claim Rs. 1,50,000 or any other sum as damages. The defendant says that having regard to the terms of the said notice the plaintiff is not entitled to make any charge in this suit in respect of any alleged malice or in respect of any allegations exceeding the limit of just comment or in respect of any reckless indifference to the truth or falsity of the facts published on the part of the Government of Bombay, and is not entitled to claim in this suit any sum of money by way of damages.
- 6. The defendant says that there was in fact no malice or excess of just comment or reckless indifference to the truth or falsity of the facts published on the part of the Government of Bombay.
- 7. The defendant says that the statements in the said Resolution are true in substance and in fact and were justified by the conduct of the plaintiff and the reports and papers connected with his case.

8. The defendant says that this Honourable Court has no jurisdiction to order that the said Resolution be set aside.

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The issues raised by the Counsel for defendant at the hearing were as follows:

- (1) Whether the Court has jurisdiction to entertain this suit.
- (2) Whether this suit is maintainable against the defendant.
- (3) Whether the plaint discloses any cause of action against the defendant.
- (4) Whether, having regard to the notice of action given by plaintiff, he is entitled to maintain this suit in respect of any false or malicious libel published by the Government of Bombay.
- (5) Whether the statements in the said Resolution are not absolutely privileged.
- (6) Whether there was any malice on the part of the Government of Bombay in issuing the said Resolution as alleged in paragraph 7 of the plaint.
- (7) Whether the statements in the Resolution were not true in substance or in fact and justified by conduct of plaintiff and reports and papers connected with the case.
- (8) Whether having regard to plaintiff's notice of action he is entitled to claim any sum by way of damages.
- (9) Whether this Court has jurisdiction to set aside the Resolution of the Government of Bombay.
- (10) Whether plaintiff is entitled to the relief prayed for or any and what part thereof.

Counsel for the defendant applied under section 146 of the Civil Procedure Code (Act XIV of 1882) that the first five issues should be tried as preliminary issues, contending that if decided for the defendant the suit would go no further.

The plaintiff objected and contended that, in order to decide the questions raised in the case, it would be necessary that evidence should be taken. He raised the following additional issues:

- 11. Having regard to the Resolution being an act counselled, ordered and done by the Governor and Council and having regard to the provision of Statute 4 Geo. IV, c. 71, is the Governor in Council subject to the jurisdiction of this Court?
- 12. Apart from the provision of the said statute, is the suit maintainable against the Secretary of State for the Resolution issued and published by the Governor in Council in their public capacity on behalf of Her Majesty the Queen-Empress?
- 13. Do the allegations in the plaint contained, and particularly paragraph 7 thereof, disclose a cause of action against defendant and the Government of Bombay?

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- 14. Is the Resolution malicious or in excess of just comment or reckless indifference to truth or falsity of the facts published in the Government Resolution?
- 15. Are the statements in the Resolution true and justifiable? If not, which of them?
- 16. Was the said Resolution counselled, ordered and done according to the rules and orders and pursuant to the provisions of section 28 of the Indian Councils Act, 1861?

The plaintiff contended that his issues raised the real questions in the case and that they could not be decided as preliminary issues.

TYABJI, J.:—The question is whether the first five issues raise questions of law the decision of which may dispose of the suit, assuming the facts to be as the plaintiff alleges them in the plaint. These facts for the purpose of the argument on these issues are admitted on behalf of the defendant, but it is contended that even admitting them the plaintiff's suit is not maintainable. These being the questions raised on the issues, I think they should be tried as preliminary issues.

Scott (Advocate General) and Kirkpatrick for the defendant: We submit that this suit is not maintainable. The plaintiff sues the Secretary of State for a libel published of him by the Government of Bombay. That is the allegation in paragraph 7 of the plaint. The first point then is whether, assuming that the Government of Bombay have committed this wrong, the Secretary of State is liable for it. Section 416 of the Civil Procedure Code (Act XIV of 1882) provides that suits against the Government may be brought against the Secretary of State. We submit that the Government mentioned in the section means, not a local Government, but the Supreme Government, the Government of the King, i. e., the Government of India. Under that section suits against the Government of the King in India may be instituted against the Secretary of State. In what class of suits may he be sued? In England there is no remedy against the Crown for a tort. In such a case the maxim that the king can do no wrong applies. Where the tort is committed by a Government official, the remedy (if any) is against the individual and not against the head of the department: Raleigh v. Goschen. (1) In the case of

contracts the remedy in England is by Petition of Right. That is the law in England.

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In India, until 1858, the Government was vested in the East India Company. That Company exercised different functions. It was partly a trading Company with the rights and liabilities of an ordinary commercial body. It also exercised sovereign power delegated to it by the Crown. In respect of its acts in the former capacity it could be sued. For its acts in the latter capacity it could not.

In 1858 the East India Company came to an end and since then India has been governed directly by the Crown. Statute 21 and 22 Vict., c. 106, sections 1 and 2, the territories and revenues of India were transferred to the Crown. In order. however, that no one should be deprived of any right or claim which he might have had against the East India Company, section 65 of that statute provided that the Secretary of State in Council as a body corporate (not personally, see section 68) might be sued in all cases in which the Company might have been sued. Thus the Secretary of State in Council now stands in the position of the Company and can be sued in cases in which the Company would formerly have been sued. But it could not have been sued in respect of acts done by it as a sovereign power, but only in respect of acts which did not fall within that category. The liability of the Company is now the liability of the Secretary of State and the suits referred to in section 416 of the Civil Procedure Code are suits in respect of acts of Government which are not acts of State, i.e., which have no relation to the Government of the country, and the section clearly refers to the Government of India and not to local Governments: compare section 419 of the Civil Procedure Code. The P. & O. Steam Navigation Co. v. Secretary of State(1) is an illustration of the cases in which the Secretary of State is liable. The act for which the Government was there held liable was not an act of Government as the ruling power. The distinction is clearly taken by Peacock, C.J., who says (see page 14): "But where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully

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exercised except by a sovereign, or private individual delegated by a sovereign to exercise them, no action will lie." See also Gould v. Stuart⁽¹⁾; Vijaya Ragava v. Secretary of State for India⁽²⁾. Ilbert on the Government of India, page 161.

We submit that as the East India Company could not have been sued in respect of any act done by it as a sovereign power, so the Secretary of State, who now so far as acts of sovereignty are concerned stands in the place of the Company, is similarly exempt in respect of such acts: Statute 24 and 25 Vict., c. 11, section 4; In re Wallace. The position of the Secretary of State in Council is discussed in Kinlock v. Secretary of State and Nobin Chunder v. Secretary of State, this which last case was dissented from in Secretary of State v. Hari Bhanji. The most important cases on the point are Grant v. Secretary of State and Chatterton v. Secretary of State.

Then comes the question whether the publication of the Resolution in question censuring and punishing the plaintiff was an act of state or sovereignty for which no suit lies. The plaintiff here was an officer employed by Government in the administration of the country. We submit that an act of Government dealing with one of its own officers is an act of state for which no action could have been brought against the East India Company, and for which no action therefore now lies against the Secretary of State. The East India Company had ample power over its officers: see 33 Geo. III, c. 52, sections 55 and 56; Stat. 3 and 4 Will. IV, c. 85, sections 74, 75. That power has now been transferred to the Government of the Crown. As to the power of Government over its servants, see Mitchell v. The Queen (9); Dunn v. The Queen.(10) Civil and military servants stand in the same position: Shenton v. Smith.(11) See also Ilbert's Government of India, pages 159, 160, and 33 Geo. III, c. 52, sections 35 and 36.

^{(1) (1896)} Ap. Ca. 575.

^{(2) (1884) 7} Mad. 466.

^{(3) (1884) 8} Mad. 24.

^{(4) (1880) 15} Ch. D. 1; Sub. Nom. Kinlock v. Secretary of State (1882) 7 Ap. Ca. 619.

^{(5) (1875) 1} Cal. 11.

^{(6) (1882) 5} Mad. 273.

^{(7) (1877) 2} C. P. D. 445.

^{(8) (1895) 2} Q. B. 189.

^{(9) (1896) 1} Q. B. 121 f. n. (decided 1890).

^{(10) (1896) 1} Q. B. 126.

^{(11) (1895)} Ap. Ca. 229.

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The Government may also state its reasons for censuring its officers: see per Mansfield, C.J., in Oliver v. Lord William Bentinck (1); Chatterton v. Secretary of State for India (2); and no suit lies for publishing the reasons. See also Grant v. Secretary of State (3) and Gould v. Stuart. (4)

The plaintiff, however, here complains not of the act of the Government of India, but of the act of the local Government of Bombay. What is the position of the local Government? It is merely an executive department composed of certain individuals entrusted with certain powers: see Stat. 3 and 4 Will. IV, c. 85, sections 56 and 57; see also the definition in the General Clauses Acts (I of 1868), section 2, clause 10, and Act X of 1897, section 3, clause 29. The local Government is not a corporation and cannot be sued as such. The plaintiff makes no charge against the individuals comprising the local Government. If he did, he should have given the notice required by section 424 of the Civil Procedure Code (Act XIV of 1882), but no such notice was given. But it is clear that no suit is maintainable against the individual members of Government for their official acts, and if so, of course no suit can lie against the Secretary of State for such acts. It has always been the policy of the Legislature to exempt the members of the local Government from the jurisdiction of the Courts in India for acts done in their official capacity. See Stat. 37 Geo. III, c. 142, section 11; 4 Geo. IV, c. 71, section 7, and 21 Geo. III, c. 70, section 1; Stat. 24 and 25 Vict., c. 104, section 9; Ilbert's Government of India, page 251, paragraph 105. See also per Kernan, J., in Collector of Sea Customs v. P. Chithambaram. (5) We therefore submit that the members of the Government have an absolute privilege in respect of their official acts: Grant v. Secretary of State (3); Chatterton v. Secretary of State (2); and Oliver v. Bentinck. (1) The publication of the Resolution in question was an official act and was therefore privileged, and even if it were proved that in publishing it the members of Government were actuated by malice they would be protected. The document is an official communication and is

^{(1) (1811) 3} Taunt. 456 at p. 459.

^{(2) (1895) 2} Q. B. 189,

^{(3) (1877) 2} C. P. D. 445. (4) (1896) A. C. 575.

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absolutely privileged and cannot even be produced or proved in Court. See *Dawkins* v. *Paulet* (1); *Dawkins* v. *Rokeby* (2); *Hennessy* v. *Wright*. (3)

Lastly, we say the notice given by plaintiff was insufficient. By section 424 of the Civil Procedure Code (Act XIV of 1882) a plaintiff is to give notice of his cause of action. The notice states the cause of action to be the publication of statements which the plaintiff alleges to be libellous per se; he does not there allege malice. But in his plaint (paragraph 7) he alleges express malice. That is not covered by the notice given.

As to express malice see Nevill v. Fine Arts Company cited in Odgers on Libel; Abrath v. North Eastern Railway Company. (4)

Plaintiff in person:—I contend (1) that the charges made against me in the Resolution of which I complain are untrue; (2) the Government have given undue publication to the Resolution; (3) the Resolution was passed irregularly and not according to the ordinary procedure; (4) the Government did not give me a full hearing in answer to the charges made against me; (5) it was unnecessary to state the charges against me in the Resolution.

These are the allegations I make. It is contended that the Government is protected and that I have no remedy. I submit that no Government has a right to libel its servants, and that its power over them of dismissal or punishment must be exercised in a proper manner: Hughes v. Secretary of State⁽⁵⁾; East Freemantle Corporation v. Annois⁽⁶⁾; Canadian Pacific Railway v. Parke⁽⁷⁾; Pudan v. The Secretary of State.⁽⁸⁾ The Resolution was not passed in the course of official duty: Folkard on Libel, page 359. It ought to have been sent by letter and marked confidential: Williamson v. Freer.⁽⁹⁾ The Government exceeded its duty: Vallabha v. Madusudanan.⁽¹⁰⁾

As to the jurisdiction of the Court, plaintiff cited Narayan v. Norman (11); P. & O. Steam Navigation Company v. Secretary of

^{(1) (1869)} L. R. 5 Q. B. 94.

^{(2) (1873)} L. R. 7 H. L. 744.

^{(3) (1888) 21} Q. B. D. 509 at p. 512.

^{(4) (1886) 11} Ap. Ca. 247 at p. 253.

^{(5) (1871) 7} Beng. L. R. 688.

^{(6) (1902)} Ap. Ca. 213 (decided 1901).

^{(7) (1899)} Ap. Ca. 535.

^{(8) (1899) 3} Cal. W. Notes (P. C.) exli.

^{(9) (1874)} L. R. 9 C. P. 393.

^{(10) (1889) 12} Mad. 495.

^{(11) (1868) 5} Bom, H. C. Rep. 1 (O. C.)

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State 1): Vijaya Ragava v. Secretary of State for India (2); Rex v. Stepney Corporation.(3)

As to sufficiency of notice of suit he cited Sabin v. De Burgh (4): Secretary of State for India v. Perumal(5); Stokes v. Hill(6); Kharshedji N. Cama v. Secretary of State. (7)

He also referred to Walker v. Baird(8); Dulieu v. White & Sons 9); Quinn v. Leatham(10); Maxwell on Statutes, pages 320. 333, 356, 361-368; Ilbert's Government of India, pages 62 and 174; and Shepherd v. Trustees of the Port of Bombay.(11)

Plaintiff also cited the following cases:—As to the maintainability of suit, he cited Cornford v. Carlton Bank(12); Stockdale v. Hansard(13); Graham v. Public Works Commissioners(14); Secretary of State v. Jagat Mohini(15); Reg. v. Janardhan.(16) As to jurisdiction, Bell v. Municipal Corporation of Madras. (17) As to notice and construction of statutes, Smith v. West Derby Local Board(18): Parbutti v. Nobin(19); Jones v. Bird(20); Higgins v. Dawson, (21) As to cause of action, Chinnappa v. Sikka Naikan(22); Reed v. Friendly Society of Stonemasons, &c.(23) As to libel and privileged communication, Stevens v. Sampson. (24)

TYABJI, J.:—This suit was filed by Mr. Jehangir Manekji Cursetji against the Secretary of State for India in Council on the 6th November, 1900, complaining of a Resolution of the Government of Bombay, set forth in the plaint, and praying that the plaintiff may be awarded a sum of Rs 1,50,000 as damages sustained by the wrongful acts of Government, and that the said Resolution dated the 6th November, 1899, may be ordered to be set aside, and for costs of the suit.

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(1) (1861) 5 B. H. C. R. 1 appx.
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^{(2) (1884) 7} Mad. 466.

^{(3) (1902) 1} K. B. 322 (decided 1901).

^{(4) (1809) 2} Campb. 196.

^{(5) (1900) 24} Mad. 279.

^{(6) (1901) 1} K. B. 493 at page 496.

^{(7) (1868) 5} Bom. H. C. Rep. 97 (O. C.).

^{(8) (1892)} Ap. Ca. 491.

^{(9) (1901) 2} Q. B. 669.

^{(10) (1901)} Ap. Ca. 495.

^{(11) (1876) 1} Bom. 477.

^{(12) (1899) 16} Times Law Rep. 12.

⁽¹³⁾ Broom's Constitutional Law, p 25.

^{(14) (1901) 2} K. B. 781 at pp. 790-1. (15) (1901) 28 Cal. 540.

^{(16) (1894) 19} Bom. 703.

^{(17) (1902) 25} Mad. 457.

^{(18) (1878) 3} C. P. D. 427.

^{(19) (1883) 13} Cal. L. R. 195.

^{(20) (1822) 5} B. and Ald, 837.

^{(21) (1902)} Ap. Ca. 1.

^{(22) (1900) 24} Mad. 36.

^{(24) (1879) 5} Ex. D. 53.

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The plaintiff, at the time of the Resolution complained of, was a Government servant in the Provincial Civil Service of the Bombay Presidency, and, according to the plaint, had served Government for twenty-five years. Prior to this Resolution he was serving as a fourth grade Deputy Collector, and was in charge of the treasury. The Resolution, which is dated the 6th November, 1899, is based upon a memorandum from the Commissioner, C. D., commenting on the conduct of the plaintiff in respect of certain of the plaintiff's acts in the course of the trial of a case by him as Magistrate. The Resolution says:

After a careful consideration of the painful facts disclosed in these papers and of the explanations tendered by Mr. Cursetji, the Governor in Council has come to the conclusion that that officer has been guilty of misconduct reflecting gravely on his reputation for honesty and trustworthiness in the following respects:

- (1) Improperly requiring the accused person in a criminal case, conducted by him (Mr. Cursetji) in his Magisterial capacity, to pay for the conveyance of himself and the complainant in the same case to pay for the conveyance of his clerk Bhange to the scene of the offence alleged to have been committed by the accused, namely, to the village of Wachpe, distant some 59 miles from Poona, and back, and in receiving himself from the defendant the sum of Rs. 25 and in permitting his clerk Bhange to receive from the complainant the sum of Rs. 16-12-0 in respect of the said expenses of conveyance.
- (2) In having after the receipt of the said expenses improperly d rawn bills upon Government and obtained from the treasury the sum of Rs. 29-8-0 for himself and permitted his clerk to obtain Rs. 14-12-0 in respect of the same journey.
- (3) Entering incorrect dates in his own travelling allowance bill in order to prevent objection being raised in audit to the drawing by him of mileage allowances on at least one of the days on which he travelled.
- (4) In connection with the travelling allowance bill of the clerk Bhange deliberately signing certificates which he knew to be false.

The Resolution then goes on commenting on the above charges in the following terms:

As regards the first and second charges Mr. Cursetji's defence is simply a denial of the impropriety alleged. Such a defence will not bear even the most slender examination. The impropriety of taking money on any pretext whatever from parties to a Magisterial case under inquiry before him must be patent to any officer called upon to discharge Magisterial duties. As an experienced Account Officer Mr. Cursetji must be intimately conversant with Articles 1086 and 1087 of the Civil Service Regulations, and fully aware, therefore, that he was not entitled himself to make or to allow his clerk to make travelling allowance a source of profit.

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- 3. As regards the third charge, Mr. Cursetji asserts that the erroneous dates were signed to by him through inadvertence. The fact that the errors resulted to his advantage, conjoined with the other discreditable circumstances of the case, throw grave doubts on the credibility of the defence. It was also Mr. Cursetji's clear duty, as he must have been fully conscious, to be scrapulously careful that the entries of dates on which he travelled were absolutely accurate.
- 4. As regards the fourth charge, it is shown that Mr. Cursetji certified (1) that the amount entered in the clerk's travelling allowance bill (Rs. 14-12-0) did not exceed his actual travelling expenses, and (2) that these expenses were Rs. 16-12-0, whereas Mr. Cursetji knew as a matter of fact that his clerk's expenses were nil, that he paid nothing for the tonga mentioned in the bill, and that he was conveyed free of cost to Wachpe and back by the complainant in the case. Mr. Cursetji thus actively abetted his clerk in committing a fraud on Government by passing a bill and signing statements which to his knowledge were false. His defence to these charges that he signed the certificates by inadvertence and believed on the assurance of his clerk and office that the charges were justifiable can only be characterised as purile and incredible.

The Resolution then proceeds as follows:

- 5. The above four charges having been found proved against Mr. Cursetji, it has to be decided what notice should be taken of his misconduct. The Governor in Council has most seriously considered whether the case would be met by any punishment short of dismissal, and has been mainly induced by consideration of Mr. Cursetji's length of service (twenty-two and a half years) and by compassion for those who are dependent on him to limit his award to the following penalties:
 - (1) The reduction of Mr. Cursetji to the sixth grade of Deputy Collectors.
 - (2) The stoppage of all further promotion for him.
 - (3) His compulsory retirement at the age of 55.
- (4) The refund of the amount of travelling allowance fraudulently drawn by him.

It is in respect of the charges of misconduct and dishonesty that the plaintiff mainly complains. He says in the plaint that he tried to obtain redress from Government, and obtaining none, he gave notice to Government of his intention to file this suit. That notice is Exhibit B, attached to the plaint, and is dated the 4th September, 1900. After reciting certain previous facts, the notice in paragraph 5 proceeds as follows:

I have, therefore, in order to avoid the bar of limitation, under section 424 of the Civil Procedure Code, to give you notice that in the event of my being so unfortunate as to fail to secure justice at the hands of the Government of Bombay and India, I shall file an action against the Secretary of State in

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- Council for (a) cancellation of Government Resolution No. 7846 of 6th November last, (b) for loss of character, as I am advised that the following words in the said Resolution are libellous:
- (1) That officer has been guilty of misconduct reflecting gravely on his reputation for honesty and trustworthiness, in respect of my official conduct, the subject-matter of the said Resolution.
- (2) 'Conjoined with other discreditable circumstances of the case, throws grave doubt on the credibility of the defence.'
- (3) 'Mr. Cursetji thus actively abetted his clerk in committing a fraud on Government by passing a bill and signing statements which to his knowledge were false.'
- (4) 'The refund of the amount of travelling allowance fraudulently drawn by him.'

At the first hearing before me the following issues were raised on the pleadings of the learned Advocate General, and afterwards by the plaintiff:

- (1) Whether this Court had jurisdiction to entertain this snit.
- (2) Whether this suit is maintainable against the defendant.
- (3) Whether the plaint discloses any cause of action against defendant.
- (4) Whether having regard to the notice of action given by the plaintiff he is entitled to maintain this suit in respect of false or malicious libel published by the Government of Bombay.
- (5) If the first four issues are found against the defendant, whether the statements in the Resolution are absolutely privileged.

Issues 11 to 17, raised by the plaintiff, are substantially the same as the above issues, but perhaps in greater detail.

The learned Advocate General applied to me that the first four issues being questions of Iaw should be determined first, as, if these issues were found against the plaintiff, it would be unnecessary to proceed any further with the case or record any evidence. The plaintiff objected to the course, apparently because he thought that the evidence he might be able to produce might remove some of the objections the Court might possibly feel in deciding these issues. After some discussion I was of opinion that it would be best to decide these issues in the first instance, and at the request of the plaintiff the fifth issue was also to be decided in the first instance, along with the first four, as desired by the learned Advocate General. It seemed to me, however, fair to the plaintiff that in considering these issues the Court should have before it not merely the allegations in the

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notice, nor merely the statement and allegations in the plaint, but that he should also be permitted to explain more fully and more in detail, what he meant by his allegations in the plaint as regards the action of Government. Accordingly at the suggestion of the Court, the learned Advocate General acquiesced in the Court taking into consideration all the explanations and details of the case, and all the allegations which the plaintiff thought he would be able to place before the Court, if allowed to do so. The allegations, explanations and details are all set forth fully in the affidavit of the 8th September, 1901, which the plaintiff made in answer to the interrogatories administered to him on behalf of the defendant. It seems to me, therefore, that having regard to what has actually taken place between the Court, the learned Advocate General and the plaintiff, that the Court could not possibly be in a better position for the determination of these issues than it is at this moment. For the purposes of the issues I have to determine I am now going to assume that the plaintiff's explanations, allegations and statements are true, and that if the plaintiff is allowed to go into evidence he will be able to establish those allegations.

Now the first question, which I think it necessary to refer to, is the question of notice. The learned Advocate General argued that that notice was confined merely to a suit based upon the document which was libellous and defamatory in itself, and that not having made any allegations in that notice of any actual or expressed malice on the part of the defendant, the suit as now framed cannot be allowed to proceed on the basis of express malice, and must be confined simply to the various issues on the document itself as if no malice had been alleged. Now it is perfectly true that the notice does not allege any "express malice." That is probably, as the plaintiff explains, from motives of delicacy, and not liking to offend the feelings of Government officials he abstained from charging them with malice, but that at the same time the notice is one which is consistent with a case based on actual malice. At all events I see nothing in it which is inconsistent with actual malice. The authorities on these points show very clearly that the object of such notices as that required by section 424 of the Civil Procedure Code is to

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inform Government, or the public officers concerned, generally of the nature of the suit which is intended to be filed against them. It has been decided that these notices must not be too strictly or too narrowly construed. They must not be construed as if they were pleadings and that they need not set out all the details and facts of the case which the plaintiff intends to prove, and that the notice must be considered sufficient if it substantially fulfils its object in informing the parties concerned generally of the nature of the suit intended to be filed. This proposition of law is borne out by the following cases: Secretary of State v. Perumal Pillai(1); Stokes v. Hill(2); Smith & Co. v. West Derby Local Board (3); Parbutti v. Nobin Chunder (4); Sahin v. DeBurgh (5); Jones v. Bird. (6) On the whole, therefore, I am of opinion that the notice is sufficient to cover the case as now made by the plaintiff, viz., that including the allegations of malice against officers of Government who were parties to the issue of the Resolution.

The next question is whether this Court has jurisdiction to try this suit. Shortly the argument of the learned Advocate General was that the Resolution in question was issued or purported to be issued by the Government of Bombay; that the Government of Bombay itself, that is to say, His Excellency the Governor and the two Members of his Council, are exempt from the jurisdiction of this Court, because they must be taken to have acted in a public capacity; and that if the Members of the Bombay Government are exempt, the Secretary of State in Council must also be exempt, because, if he is liable at all, he is only liable through the Bombay Government by reason of the public acts of the Government of Bombay. It was also argued that the suit against the defendant must be taken substantially to be a suit against the Government of the King-Emperor, and that as a broad constitutional principle of law no suit will lie against Government in matters of tort, including libel, on the principle that the King can do no wrong. It was also argued that apart from this general and universal principle, suits against

^{(1) (1900) 24} Mad. 279.

^{(2) (1901)} I K. B. 493.

^{(3) (1878) 3} C. P. D. 423 at pp. 427, 428.

^{(4) (1883) 13} Cal. L. R. 195.

^{(5) (1809) 2} Camp. 196.

^{(6) (1822) 5} B. &. Ald. 837-844.

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. the Secretary of State in Council are only permitted and can lie only in respect of matters for which the East India Company could have been sued, and it was argued that the East India Company, although it could have been sued as a trading corporation and in regard to those matters and things as to which private merchants or individuals might have been sued, yet that it could not have been sued in respect of those acts of sovereignty which were delegated to it, and which it performed as a governing body in this country. It was further argued that the employment of public servants, Naval, Military, Civil, Magisterial, Judicial, or Revenue, and their dismissal or compulsory retirement was a matter which partook of the character of sovereign acts, which could not be brought within the cognizance of the municipal Courts of the country, and that therefore no suit would lie against Government for the dismissal of any servants of the Crown or Government.

It was further argued, on the principle that the greater includes the less, that if the Government had power to dismiss or compulsorily retire its servants, it necessarily must have power to reduce its servants or stop their promotion or to censure or reprimand them, and that all the acts of Government in relation to this matter were "acts of state and sovereignty" and could not be impugned in a Court of Justice. It was further argued that all such acts and documents or communications between Members of Government or Ministers in any way concerned with the employment and dismissal of public servants and officers were in their nature confidential and privileged, and that no action or suit could be based upon any such actions or Resolutions. Lastly, it was argued that the mere allegation that any of these acts of these public functionaries were actuated from feelings of malice will not make any difference, because the Courts will not and ought not to permit proof of any such malice being given: so it was argued by the learned Advocate General that the plaintiff's case must fail.

The case for the plaintiff shortly is the negation of these various propositions or the contention that they are too broadly stated, and that they do not apply to his case, and that if actual malice is proved there must be a decree in his favour.

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I propose to examine these various contentions at some length, not only because the matters involved in them are extremely important in themselves to the parties to this suit, but also because they are of grave importance to the public at large, and because I do not find that the particular question has ever risen before in a Court of Justice in India.

I may at once say that although the plaintiff had not had the advantage of being represented by Counsel during the arguments before me, and although he was confronted with the best legal talent, still I have no doubt he was assisted by kind legal friends outside this Court. The plaintiff has placed before me all the authorities which have or can have any bearing on the question I have to decide. I should have been extremely pained if for want of legal assistance the plaintiff could not have placed his case before me as it ought to be placed. I feel confident that the plaintiff will not suffer by reason of his not having the assistance of Counsel, as that fact has imposed on me the grave duty of inquiring into the law and authorities for myself, so that the question may be decided properly to the best of my ability and without prejudice to the plaintiff.

Now as to the first question, viz., whether this Court has jurisdiction to entertain this suit, I find that Statute 21 Geo. III, c. 70, provides, in its preamble and section 1, as follows:

* * * * *

And whereas many doubts and difficulties have risen concerning the true intent and meaning of certain clauses and provisions in the said Act and Letters Patent, and by reason thereof dissension hath arisen between the Judges of the Supreme Court and the Governor General and Council of Bengal, and the minds of many inhabitants subject to the said Government have been disquieted with fears and apprehensions, and further mischiefs may possibly ensue from the said misunderstandings and discontents if a reasonable and suitable remedy be not provided:

* * * * * *

May it therefore please your Majesty that it may be enacted, and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the Governor General and Council of Bengal shall not be subject, jointly or severally, to the jurisdiction of the Supreme Court of Fort William in Bengal for or by reason of any act or

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order, or any other matter or thing whatsoever counselled, ordered or done by them in their public capacity only, and acting as Governor General and Council.

It will be observed that this exempts the Governor General and Council from the jurisdiction of the Supreme Court of Fort William, Calcutta, in respect of any matters done by them in their public capacity.

Statute 37 Geo. III, c. 142, section 11, extends these provisions to the Government of Bombay in the following terms:

Nor shall it be competent for the said Courts within their respective jurisdictions to hear or determine or to entertain and exercise jurisdiction in any suit or action against the Governor or any of the Council at the said Settlements of Madras and Bombay respectively, for or on account of any act or order, or any other act, matter or thing whatsoever, counselled, ordered or done by them in their public capacity or acting as Governor and Council.

This, it will be observed, exempts the Governor or any of his Council from the jurisdiction of the Recorder's Court which was in existence at that time.

Statute 4 Geo. IV, c. 71, section 7, provides as follows:

Provided always, that the Governor and Council...shall enjoy the same exemption and no other from the authority of the said Supreme Court of Judicature to be there erected, as is enjoyed by the said Governor General and Council at Fort William aforesaid for the time being from the jurisdiction of the Supreme Court of Judicature there already by law established.

Then Statute 21 and 22 Vic., c. 106 [Government of India Actof 1858] in section 67 has the following provision:

All treaties made by the said Company shall be binding on Her Majesty; and all contracts, covenants, liabilities, and engagements of the said Company made, incurred, or entered into before the commencement of this Act may be enforced by and against the Secretary of State in Council in like manner and in the same Courts as they might have been by and against the said Company if this Act had not been passed.

And, lastly, Statute 24 and 25 Vic., c. 104, section 9, provides as follows:

Each of the High Courts to be established under this Act shall have and exercise all such Civil, Criminal, Admiralty and Vice Admiralty, Testamentary, Intestate, and Matrimonial Jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid grant and direct, subject, however, to such directions and

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limitations as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency towns as may be prescribed thereby; and save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts.

And section 11 runs as follows:

Upon the establishment of the High Courts in the Presidencies respectively all provisions then in force in India of Acts of Parliament, or of any orders of Her Majesty in Council or Charters, or of any Acts of the Legislature of India, which at the time or respective times of the establishment of such High Courts are respectively applicable to the Supreme Courts at Fort William in Bengal, Madras and Bombay respectively, or to the Judges of those Courts shall be taken to be applicable to the said High Courts and to the Judges thereof respectively so far as may be consistent with the provisions of this Act, and the Letters Patent to be issued in pursuance thereof and subject to the legislative powers in relation to the matters aforesaid of the Governor General of India in Council.

So that section 9 invests the High Court with general powers in respect of all classes of jurisdiction, and by section 11 all acts, &c., which applied to the Supreme Court are to be taken to apply equally to the High Court so far as they are consistent with the provisions of the Act itself. The question, therefore, is whether the exemption from the jurisdiction of the Court enjoyed by the Governor and the Members of his Council in their public capacity is a provision which is inconsistent with the general provisions of this Act.

The matter has come before the Courts in other Presidencies and I need only refer to the case of the Collector of Sea Customs v. Chithambaram, (1) where after an exhaustive consideration of the question (the question was as to the exemption from the jurisdiction of the Court in revenue matters, but the Court considered generally the powers of the High Court in relation to public officers and public policy) in a most elaborate judgment Mr. Justice Kernan says as follows:

I do not lay any great stress on the fact that there is only one exception to

the wide jurisdiction given by the Act, though it is certainly significant. No doubt particular exceptions may exist in respect of part of a general subject legislated for, though such exception is not expressly given or referred to by the statute.

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Such exception may arise when several statutes in pari materia are to be construed together, and all may stand together by treating the one statute referring to part as an exception. There is then no inconsistency. An instance of such an exception occurs in relation to the High Court jurisdiction, though not provided for in express terms, viz., the Governor and Members of Council, &c., are exempt from the jurisdiction (in respect of their official acts). This is the result of construing the Statute 24 & 25 Vic., c. 104, and the Charter, with the statutable provisions relating to the Governor and Council. But there is no inconsistency between the statutes: they may both stand together. One is an exception from the other. On principles of public policy the official acts of the Governor and Council could not be the subject of inquiry in any municipal Court.

It is, therefore, quite clear that the Governor in Council is exempt from the jurisdiction of the High Court in the same manner as he was exempt from the jurisdiction of the Supreme Court, and earlier still from the jurisdiction of the Court of the Recorder. Sir Courtney Ilbert, in his valuable book "The Government of India," page 251, section 105, treats the statute quoted by me as being still in force and applicable to the High Courts to the same extent as they applied to the Supreme Courts.

If, then, it were absolutely necessary for me to decide this question, I should be prepared to hold the same view as Mr. Justice Kernan. So far as it is necessary I hold that the Governor and the Members of the Council are exempt from the jurisdiction of this Court, so far as their acts in their public capacity are concerned. I am not dealing with malice. I hold no suit will lie in this Court in respect of public acts of the Governor and his Members.

Then comes the question whether this suit will lie against the Secretary of State. As no action will lie against the Governor and the Members of his Council, none will lie against the Secretary of State. This argument seems to me a sound one. Again, apart from the question of malice, supposing it was simply a public act, then if the Governor and the Members of his Council are exempt, the Secretary of State, whose liability can only be

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traced through the Governor and Members of Council, would be equally exempt.

I now come to the question of liability of the Secretary of State independently of these statutes referred to above. Can the Secretary of State be sued, or in other words, could the East India Company be sued, if it was still in existence? I have already referred to the Government of India Act of 1858 (21 & 22 Vic., c. 106, section 67) as laying down that the Secretary of State for India in Council can be sued in respect of those matters for which the East India Company could have been sued. This question has been discussed in the following cases: P. & O. Company v. Secretary of State(1); Nobin Chunder Dey v. Secretary of State(2); Secretary of State v. Hari Bhanji(3); Grant v. Secretary of State(4); Chatterton v. Secretary of State.(5)

Now without going through these authorities in detail, I may say at once that they have established very clearly that the East India Company could only have been sued in regard to those matters for which private individuals or trading corporations could have been sued, or in regard to those matters for which there was express statutory provision, and, conversely, they establish that no suit would lie against the East India Company in respect of acts of state or acts of sovereignty.

The next question is, was the treatment of the plaintiff under the Resolution of the 6th November, 1899, which is complained of, an act of sovereignty? This involves the question whether public servants hold their office at the pleasure of the Sovereign or how? Whether they are liable to be dismissed at the will and pleasure of the Sovereign and those who represent the Sovereign? Now I think that Stat. 33 Geo. III, c. 52, sections 35 and 36, and Stat. 3 and 4 Will. IV, c. 85, sections 74, 76, very clearly lay down the right of the Sovereign to dismiss a public servant at pleasure. They at the same time provide that that right of the Sovereign is without prejudice to the right of the East India Company also to dismiss public servants at pleasure. Indeed, this appears

^{(1) (1861) 5} Bom, H. C. appx. at p. 14.

^{(3) (1882) 5} Mad. 273.

^{(2) (1875) 1} Cal. 11.

^{(4) (1877) 2} C. P. D. 445.

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to be the general, almost universal, principle of public law, quite apart from any statutory provision. I find this principle very clearly laid down in the following cases: Chatterton v. Secretary of State(1); Grant v. Secretary of State (2); Mitchell v. The Queen (3); Dunn v. The Queen (4); Shenton v. Smith (5); Gould v. Stuart (6); Ilbert's Government of India, page 161. They clearly establish the right of the Sovereign and of his Ministers, and those who represent him, to employ and dismiss public servants at pleasure on public grounds. Indeed, so strongly is this principle laid down, that in some of the cases to which I have referred, it is even stated that it is not in the power of any of the agents of Government to contract that public servants shall hold their appointments for any fixed period and that they shall not be liable to be discharged within that period. No doubt, the majority of these cases refer to the dismissal of military officers. but there are some which expressly refer to civil officers also. The case of Dunn v. The Queen (4) was the case of a Consular agent, who is a civil officer. Shenton v. Smith(5) was the case of a medical officer who was dismissed. In all these cases it was broadly laid down that you cannot limit the power of the Crown to dismiss its officers at pleasure. I must qualify this proposition to this extent, that the power of the Crown to dismiss its public officers is necessarily limited by any statutory provision that may have been enacted for the benefit of such public servants, and it may not have application to such of the servants of Government as are not charged with functions which are in themselves the acts or the attributes of sovereignty. As the Secretary of State for India in Council is now liable to the same extent as the East India Company was, it seems to me to be extremely probable that the Secretary of State would be bound by his contracts with private individuals, where those individuals are not employed in carrying on those departments, which are essentially sovereign in their character. Sir Courtney Ilbert, in referring to the cases I have already referred to, says as follows at the bottom of page 161:

^{(1) (1895) 2} Q. B. 189, 194.

^{(2) (1877) 2} C. P. D. 445, 460, 463,

^{(3) (1896) 1} Q. B. 121 f. n.

^{(4) (1896) 1} Q. B. 116.

^{(5) (1895)} A. C. 229.

^{(6) (1896)} A. C. 575.

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It is the practice for the Secretary of State in Council to make and formulate contracts with persons appointed in England to various branches of the Government service in India, e.g., Educational officers, Forest officers, men in the Geological Survey, and mechanics and artificers in Railway and other works, and many of these contracts contain an agreement to keep the men in the service for a term certain subject to a right of dismissal for particular causes. Whether and how far the principles laid down in Shenton v. Smith (1) and Dunn v. The Queen (2) apply to these contracts is a question which in the present state of authorities cannot be considered free from doubt. A member of the Civil Service of India is expressly declared by his covenant to continue during the pleasure of Her Majesty. Tenure during good behaviour is subject to a few exceptions (e.g., the Auditor of Indian Accounts) confined to persons holding Judicial offices. But the Judges of the Indian High Courts are expressly declared by statute to hold during pleasure. The difference between the two forms of tenure is that a person holding during good behaviour cannot be removed from his office except for such misconduct as would in the opinion of a Court of Justice justify his removal; whilst a person holding during pleasure can be removed without any reason for his removal being assigned.

Now this makes it necessary for me to consider a little more minutely what the position of the plaintiff was. He was Huzur Deputy Collector of Poona, and as such, I presume, he exercised magisterial, revenue and executive functions. As regards magisterial functions, there can certainly be no doubt, that would be functions that could be given to him only as an act of state or sovereignty. No private individual could employ a Magistrate; that is clearly an act of state. The same thing may be said with regard to revenue functions. Revenue is a matter (in its imperial sense) which relates to Government and the Crown: no private individual has a right to collect revenue. That again, therefore, is an employment which, essentially in its nature, partakes of the acts of the Sovereign. As regards the other executive functions, the same may be said, though they may not quite partake of the same character. But what I have said is quite enough to show that the plaintiff's employment must be taken, on the whole, to partake more of that character of employment which can only be given to him by the Sovereign or the agents of the Sovereign, and which could not be given to him by any private individuals. That being so, it is quite clear that the plaintiff was liable to be dismissed at the pleasure

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of the Crown or agents of the Crown, that is, the Government of Bombay. There is no allegation of the plaintiff that he was employed for any specified period, or that there were any regulations or conditions which limited the pleasure of Government. He held his appointment at the will and pleasure of Government.

Then comes the question whether the plaintiff, apart from his reduction and stoppage of promotion, has any cause of action for anything contained in the Resolution of the 6th November, 1899. I have already said that the power of dismissal must necessarily include all other powers, on the principle that the greater includes the less. The power to dismiss necessarily gives the power to reduce. He can have no cause of action in a municipal Court of Justice for his reduction. Then as to censure and reprimand, it follows from the power of dismissal that the Crown has also the power of censuring its officers. It is singular that I can find no authority, nor have I been referred to any. by either side, in which the principle underlying this question has been clearly established by authority. It seems to me that the power of censuring must be included in the power of dismissal. It may be at times unnecessary to dismiss an officer; a censure or reprimand may be a sufficient penalty. Therefore, though there is no express authority, I must hold it is open to Government by Resolution or otherwise to censure or reprimand an officer.

The plaintiff's case goes further. He says that it may be that Government have power to dismiss, to degrade, or to stop his promotion, but, he says, Government have no power to libel him, or slander him, and therefore, in this case, Government having been guilty of libel must be liable to the jurisdiction of this Court. Now let me first consider where this libel lies. It is contained in the Resolution, which in the plaint is described as the Resolution of the Government of Bombay, and it is so described in the notice. Taking it to be a Resolution of the Government of Bombay (apart from any question of malice for the present) as a document which is per se defamatory and which would be a libel in an ordinary case, the question is whether the plaintiff can maintain a suit against the Secretary of State and the Governor in Council. The cases of Dawkins v.

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Paulet,(1) Dawkins v. Rokeby,(2) Henessey v. Wright,(3) Grant v. The Secretary of State,(4) Chatterton v. The Secretary of State,(5) Oliver v. Bentinck, (6) lay down very broadly that all communications between Ministers of State with regard to public matters or public functions, and all expressions of opinion on the conduct of public duties by the officers of State, and all records and documents in which the opinions or orders of public officers relating to other public officers are contained, are absolutely privileged, and that they are privileged to such an extent that they cannot be compelled to be produced, and that even if the defendant or any party in whose possession that document may be is willing to produce it, the Court ought not to notice it, and ought not to allow that document to be put in or produced. They further lay down that if primd facie the document is privileged, if prima facie it purports to be an official communication which would be privileged, then no allegation of malice would be allowed, and no proof of malice will take away the privilege. It then comes to this, that any charge of libel against a public officer must fail if it is contained in a document which is privileged, because that document cannot be produced and so is incapable of being proved in Court. Therefore you have a public officer prima facie acting in his public capacity. and once you have the document prima facie a privileged one, no action can be based upon any libel, however malicious that may be, contained in that document. This view is supported by the decision in Dawkins v. Paulet,(1) in which case Mellor and Lush, JJ., delivered a judgment, in which Mr. Justice Haves agreed. but from which Chief Justice Cockburn differed. Mr. Justice Mellor, at page 113, says:

To this plea the plaintiff replied that the words in the declaration mentioned were written and published of actual malice on the defendant's part and without any reasonable, probable or justifiable cause and not bond fide or in the bond fide discharge of the defendant's duty as such superior officer as aforesaid. To this replication the defendant demurred, and as one ground of demurrer alleged that no action is maintainable in respect of words written and published under the

^{(1) (1869)} L. R. 5 Q. B. 94.

^{(2) (1873) 7} E. & Ir. Ap. 744.

^{(3) (1888) 21} Q. B. D. 509.

^{(4) (1877)} C. P. D. 445.

^{(5) (1895) 2} Q. B. 189.

⁽c) (1811) 3 Taunt, 456,

circumstances stated in the plea, even if written and published maliciously and without reasonable or justifiable cause.

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Then he goes on:

I am of opinion that such replication is bad and is no answer to the matters alleged in the plea. If it was the defendant's duty to write such letters and to make such reports touching the plaintiff's conduct, qualifications and fitness as an officer, which is admitted by the replication, I do not see how it makes the defendant's conduct actionable because he did what it was his duty to do, maliciously and not bona fide in the discharge of his duty.

Dawkins v. Rokeby (1) is to the same effect and Hennessey v. Weight (2) lays down the same doctrine.

Then we come to the case of Grant v. Secretary of State. (3) which is a decision of Mr. Justice Grove, who goes very elaborately into all the previous authorities on the point. He cites (page 461) a passage from the judgment of Dallas, C.J., in Gidley v. Lord Palmerston, (4) which contains the following quotation from a judgment of Ashurst, J.:

In great questions of policy we cannot argue from the nature of private agreements Great inconveniences would result from considering a Governor or Commander as personally responsible No man would accept of any appointment of trust under Government under such conditions.

And also one from the judgment of Mr. Justice Buller:

Where a man acts as agent for the public, and treats in that capacity, there is no pretence to say that he is personally liable.

Dallas, C.J., for himself said:

I am aware that these cases are not in their circumstances precisely similar to the present, and, perhaps in respect of some of the circumstances belonging to the present case, I may personally have doubted longer than, I am now satisfied, I ought to have done; but in their doctrine they go to this, that, on principles of public policy, an action will not lie against persons acting in a public character and situation, which from the very nature would expose them to an infinite multiplicity of actions, that is, to actions at the instance of any person who might suppose himself aggrieved; and, though it is to be presumed that action improperly brought will fail, and it may be said that actions properly brought should succeed, yet the very liability to an unlimited multiplicity of suits would in all probability prevent any proper or prudent person from accepting a public situation at the hazard of such peril to himself.

^{(1) (1873) 7} E. & Ir. Ap. 744.

^{(2) (1888) 21} Q. B. D. 509.

^{(3) (1877) 2} C. P. D. 455 at pp. 461, 462.

^{(4) (1822) 3} B. & B. at p. 286.

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Grove, J., adds:

It is true this was an action of contract; but the reasons given in the judgment apply generally to 'an action against a public agent for anything done by him in his public character or employment,' and, as it appears to me, apply à fortiori to an action of tort where there is no charge of personal action and personal malice.

It is further important to observe that at page 463 Grove, J., says:

I might decide this point upon the narrower ground that there is no averment that the defendant personally ordered, sanctioned, or knew of the publication in the Gazette, and that the statement in the order itself, that it is under the authority of Government, it being signed "Commander-in-Chief," is no sufficient allegation that the publication was the act of the defendant; but I prefer deciding it upon the broader ground, as, if I am right as to that, great expense may be saved to the plaintiff. I will add that, if I am right as to the first point, viz., that the act of removal is not within the cognizance of this Court, it seems to me that the publication in the official Government record of that act, being obviously necessary for the information of those whom it may concern, is in my judgment also not within the competence of this Court.

Lastly, Chatterton v. The Secretary of State⁽¹⁾ seems to me to go much further than is necessary for me to go in this case. It lays down generally that "a communication relating to State matters made by one officer of State to another officer in the course of his official duty is absolutely privileged and cannot be made the subject of an action for libel." This decision is the decision of three eminent Judges, and Lord Esher, Master of the Rolls, at page 190 of the report says:

The plaintiff in this case has brought an action of libel against the Secretary of State for India in Council. It would seem from the form of the action that it is meant to be brought against him in his official capacity, treating him as a corporation, not against him personally. But it would have made no difference if it had been brought against him as an individual. The substance of the case is that it is an action brought against him in respect of a communication in writing made by him as a Secretary of State, and, therefore, a high official of the State, to an Under Secretary of State in the course of the performance of his official duty. The Master, the Judge at Chambers, and the Divisional Court have all come to the conclusion that the action is one which cannot by any

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possibility be maintained; that it is not competent to a Civil Court to entertain a suit in respect of the action of an official of State in making such a communication to another official in the course of his official duty, or to enquire whether or not he acted maliciously in making it. I think that conclusion was correct. The authorities which have been cited to us appear to show that, as a matter of clear law, a Judge at the trial would be bound to refuse to allow such an inquiry to proceed, whether any objection be taken by the parties concerned or not. It follows that such an action as this cannot possibly in point of law be maintained; and, that being so, to allow it to proceed would be merely vexatious and a waste of time and money. The reason for the law on this subject plainly appears from what Lord Ellenborough and many other Judges have said. It is that it would be injurious to the public interest that such an inquiry should be allowed, because it would tend to take from an officer of State his freedom of action in a matter concerning the public weal. If an officer of State were liable to an action of libel in respect of such a communication as this, actual malice could be alleged to rebut a plea of privilege, and it would be necessary that he should be called as a witness to deny that he acted maliciously. That he should be placed in such a position, and that his conduct should be questioned before a jury, would clearly be against the public interest and prejudicial to the independence necessary for the performance of his functions as an official of State. Therefore the law confers upon him an absolute privilege in such a case.

Further on at page 192 Kay, L.J., says:

I am of the same opinion. I will assume that the statement of claim sufficiently alleges that the statement made by the defendant, of which the plaintiff complains, was untrue, and that it was made with malicious intent. But assuming that to be so, the question arises whether under the circumstances that statement is not absolutely privileged, and therefore one upon which no action can be founded.

Then he goes into the question and holds that no action can be founded, and that it is absolutely privileged.

Now, applying the principles laid down in these authorities, it seems to be clear that if the Resolution complained of be brought into Court, it must be held to be absolutely privileged; that the plaintiff would not be able to have it produced in Court; even if it was produced in Court, it would be my duty to refuse it to be put in evidence, and that no secondary evidence could be led. The result must necessarily be that plaintiff must fail because the charge of malice cannot be allowed to be proved against a public functionary.

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On these authorities and on the grounds I have stated, I must find on the first issue for the defendant, that this Court has no jurisdiction over the defendant. On the second issue, viz., whether this suit is maintainable against the defendant, that also I must hold against the plaintiff, and in favour of the defendant. The third issue, viz., whether the plaint discloses any cause of action, I hold in favour of the defendant and against the plaintiff. On the fourth issue, viz., whether having regard to the notice of action given by the plaintiff he is entitled to maintain this suit in respect of false and malicious libel, I hold in favour of the plaintiff and against the defendant, in that I hold the notice given to be sufficient. The fifth issue, viz., whether if the first four are found in favour of the defendant the statements in the Resolution are not absolutely privileged, I find in favour of the defendant and against the plaintiff. The result is that the plaintiff must be non-suited and his suit dismissed.

The plaintiff appeals to me and says that all that he wants is a public inquiry into his conduct. I have already stated that I am debarred from entering into that question on the ground of express statutory law and also on the ground of public policy. I cannot in this Court give him any redress. But it does not follow that because the plaintiff has mistaken his remedy and come to me, therefore there is no remedy for him at all. The maxim on which he relied, that there can be no wrong without remedy, is a maxim of universal acceptance, and the fallacy of the plaintiff's reasoning lies in this, that he assumes justice only lies within the four walls of this Court; he thinks that there is no justice in the Secretariat, or in the Council of His Excellency the Governor, and also that he cannot obtain it from the Government of India, or the Secretary of State, or even, as a last resort, from Parliament.

I feel perfectly certain that if it be a fact—as to which I give no opinion—that the plaintiff's conduct has really been misunderstood or misconstrued by Government, and if it be a fact—as to which also I give no opinion—that he is able to give proper explanation of what he did, and if it further be a fact that the manner in which he acted was consistent with the

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practice of other people, all I can say is that he should go to proper authorities, and I have not the smallest doubt that if he makes a proper representation in the proper quarter his representation will be considered by the proper authorities. The mere fact that I do not entertain his suit does not debar the Government from taking such action as in the interests of public service, and having regard to the circumstances of this case, it may think it right and expedient to adopt. I can give no opinion on that point. All I say is that the plaintiff is mistaken in coming before me. He must address the proper authorities for redress, and redress will be given to him if he deserves it.

This suit is dismissed with costs. I leave it to Government whether they will enforce the costs or not.

Suit dismissed.

Plaintiff in person.

Attorney for defendant-Mr. E. F. Nicholson, Solicitor to Government.

APPELLATE CIVIL.

Before Mr. Justice Butty and Mr. Justice Aston; and, on reference, before Mr. Justice Chandavarkar.

TRIBHOVAN CHUNILAL (ORIGINAL PLAINTIFF), APPELLANT, v. THE AHMEDABAD MUNICIPALITY (ORIGINAL DEFENDANT), RESPONDENT.*

1902. December 9.

Municipality-Bombay District Municipal Act (Bombay Act VI of 1873), sections 33, 42-Private street-Balcony projecting over private street-Notice to Municipality-Disobedience of the permission granted by Municipality.

Held, by Chandavarkar and Aston, JJ. (Batty, J., dissenting), that under the District Municipal Act (Bombay Act VI of 1873) a Municipality has power to regulate or control the construction of balconies projecting over private streets.

^{*} Second Appeal No. 258 of 1902.

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SECOND appeal from the decision of Rao Bahadur Lalshankar Umiashankar, Additional First Class Subordinate Judge, A. P., at Ahmedabad, confirming the decree passed by Ráo Bahádur Chandulal Mathuradas, First Class Subordinate Judge at Ahmedahad.

Suit for an injunction restraining the Municipality of Ahmedabad from removing a balcony erected by the plaintiff.

The plaintiff owned a house in Ahmedabad facing towards the north and abutting on a private street. Along the front of the house from east to west was a verandah. To the east of the house was a passage four and a half feet wide, at the other side of which was a house occupied by a neighbour. The plaintiff obtained permission from the Municipality of Ahmedabad to construct a projecting balcony above his verandah "two feet wide, twelve feet from the ground, and leaving off five feet of space on the east." The plaintiff thereupon built the balcony, leaving a distance of five feet between the east end of it and his neighbour's house at the other side of the abovementioned passage. The Municipality, however, contended that the balcony they intended to allow was one not extending along the whole front of the plaintiff's house, but stopping short at a point five feet from the eastern corner of his house; that the "five feet of space" mentioned in their permission was to be measured from the north-east corner of the plaintiff's own house, and not from the other side of the passage. They accordingly served the plaintiff with notice requiring him to remove so much of the new balcony as was not in accordance with the permission.

The plaintiff thereupon filed this suit praying for a perpetual injunction restraining the Municipality from removing the portion of the balcony. He contended that he was justified in construing the permission granted by the Municipality as allowing him to build the balcony as he had built it, and he further contended that inasmuch as the balcony did not overhang a public street, the Municipality had no authority to prevent his building it as he had done or to require him now to remove any part of it.

The Municipality contended that the plaintiff had misconstrued their permission, and that under section 33, clause 3, of the District Municipal Act (Bombay Act VI of 1873), they could

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insist on the removal of such part of the balcony as was built in contravention of their permission. They also relied on their byelaw No. 7.(1)

The Subordinate Judge dismissed the plaintiff's suit. He held that the street in which the plaintiff's house was situate was not a public street, but he held also that the Municipality was entitled to order the removal of part of the balcony.

On appeal this decree was confirmed by the lower Appellate Court.

The plaintiff appealed to the High Court.

The following are the sections of the Bombay District Municipal Act (Bombay Act VI of 1873) referred to in the case:

33. Clause 1.—Before beginning to erect any building, or to alter externally or add to any existing building, the person intending so to build, alter or add shall give to the Municipality notice thereof in writing, and shall furnish to them, if required to do so, a plan showing the levels at which the foundation and lowest floor of such building are proposed to be laid by reference to some level known to the Municipality, and all information they may require regarding the limits, design and materials of the proposed building and the intended situation and construction of the drains, sewers, privies and cesspools (if any) to be used in connection there with.

Clause 2.—Within one month after receiving such notice the Municipality may in writing issue such orders not inconsistent with this Act as they think proper with reference to such building.

If the Municipality fail to issue written orders, whether of approval or otherwise, with reference to such building within the said period, the person originally giving notice may proceed to erect the building in question in the manner proposed by him to the Municipality, provided that such building be in accordance with the provisions of this Act.

Clause 3.—If such building be begun or made without the notice or withoutaffording the information above prescribed, or in any manner contrary to the
legal orders of the Municipality issued within the period aforesaid, or in any
other respect contrary to the provisions of this Act, the person so building shall
be liable to the penalty hereinafter provided, and the Municipality may, by

⁽¹⁾ Bye-laws of the Ahmedabad Municipality under section 42, clause 3:

^{7.} Permission to put up projecting balconies or dakhlees or weather frames (khaperas) may be given without restriction, provided that the projection be not less than twelve feet from above the ground below, and provided that a clear space of eight feet measured horizontally is left between the eaves of the house opposite and those of the houses to which a dakhlee or weather frame is to be attached.

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written notice, require such building to be altered or demolished as they may deem necessary.

42. Clause 1.—The Municipality may by written notice require the owner or occupier of any house or building to remove or alter any projection, or encroachment or obstruction, which, although erected before this Act comes into operation in the place, shall have been erected or placed against or in front of such house or building, if the same overhangs or juts into, or in any way projects or encroaches upon, any public street, so as to be an obstruction to the safe and convenient passage along such street, or if the same projects and encroaches into or upon any uncovered aqueduct, drain or sewer in such street so as to obstruct or interfere with such aqueduct, drain or sewer, or the proper working thereof: Provided always that, if such projection, encroachment or obstruction shall have been lawfully made, the Municipality shall make reasonable compensation to every person who suffers damage by such removal or alteration; and if any dispute shall arise touching the amount of such compensation, the same shall be ascertained and determined in the manner hereinafter provided.

Clause 2.—The Municipality shall possess similar power, but shall not be under obligation, of making compensation with respect to all such projections, encroachments or obstructions which shall be erected or placed after this Act comes into operation in the place.

Clause 3.—The Municipality may give written permission to the owners or occupiers of houses or buildings in public streets to put up open verandahs, balconies or rooms, to project from any apper storey thereof to an extent not exceeding four feet beyond the line of the plinth or basement wall, and any person putting up such verandahs, balconies or rooms without such permission shall be liable to the penalty hereinafter provided.

Ratantal Ranchhoddas for the appellant (plaintiff).

L. A. Shah for the respondents (defendants).

BATTY, J.:—In this case the plaintiff sued to obtain a perpetual injunction restraining the Ahmedabad Municipality, the defendant in the suit, from removing a dakhlee or balcony with overhanging eaves which the plaintiff had constructed over the ota of his house.

The defendant Municipality contended that the plaintiff had obtained permission from them to construct a balcony in the position described in the plaint, subject to the condition that it should not extend to the east beyond a point five feet from the northern extremity of the eastern wall of the plaintiff's house; that the plaintiff had disregarded this condition, and that therefore under sub-clause 3 of section 33 of the late Bombay District

Municipal Act (Bombay Act VI of 1873), and by a bye-law No.7 framed by the Municipality, the Municipality were entitled to require the removal of the structure completed in contravention of their orders. The Court of first instance held that the street on which the plaintiff's house abuts was not a public street, but that, whether the Municipality had authority to make the order or not, they were justified, by the circumstances of the case and the bye-law above referred to, in passing the order as to the construction of the balcony, in the exercise of their discretion, and that the plaintiff having constructed the balcony in defiance of that order, was not entitled to the injunction sought.

The lower Appellate Court, on further finding that the balcony in question had not been constructed under the direction of the defendant's Inspector, held that as the structure contravened the terms of the permission granted by the defendant Municipality, the plaintiff was entitled to no relief. From that decision the plaintiff now appeals.

In appeal to the lower Appellate Court as well as to this Court the plaintiff objected that the defendant Municipality had no power to order that the balcony should not be constructed over the space to which the Municipality referred in its prohibiting order, and the plaintiff alleged that as that space was not a public street, he was legally entitled to build the balcony over that space. To this contention the lower Appellate Court appears to have given no consideration. The finding of the Court of first instance that the space on which the plaintiff's house abuts and which the balcony in question overhangs is not a public street, was not questioned in the lower Appellate Court and is not now disputed.

The only question then that remains is one of law. The provisions on which the defendant Municipality rely are those contained in section 33 of Bombay Act VI of 1873. Sub-clause 1 of the section requires notice in writing and certain information to be given to a Municipality before a building is commenced, altered or added to. Neither that nor any other clause in the section contains anything requiring that the permission of the Municipality should be obtained. If such permission be necessary, therefore, the power to require it must be sought in some other provision of the Act.

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Clause 2 empowers a Municipality, on receipt of such notice, to issue such orders, not inconsistent with the Act, as they think proper with respect to such building, and authorizes the person giving notice, in case no such orders are issued, to proceed with the building, provided it be in accordance with the provisions of the Act.

Clause 3 attaches a penalty and the liability to a requisition by the Municipality for the alteration or demolition of the building in the following conditions, viz., if the building is begun or made—

- (a) without the notice or information required by clause 1;
- (b) in any manner contrary to the legal orders of the Municipality; or
 - (c) in any other respect contrary to the provisions of the Act.

Thus to justify the requisition of the Municipality for the demolition of the building, one of these three conditions must be established. There is no contention that the first or the last of these conditions exists.

The only question is, then, whether the orders of the Municipality were legal and not inconsistent with the Act. suggestion for the respondent Municipality appears to be that no orders would be inconsistent with the Act which were not in direct conflict with any of its provisions. This contention, if true, would practically leave a Municipality an unlimited discretionary power to issue any orders not expressly prohibited. No doubt, if a corporation have been duly invested with such discretionary power, it would follow that the Courts could not interfere with the bond fide exercise of such discretion: Brice on Ultra Vires, pages 500, 514-518; Ollivant v. Rahimtula Nur Mahomed, (1) Nagar Valab Norsi v. Municipality of Dhandhuka (2) and cases there cited, and compare Reg. v. Collins.(3) But it is not enough that there has been a bond fide exercise of discretion. It must necessarily further appear that the action was taken or the order was passed in the exercise of powers conferred: London County Council v. Attorney General(4); Ashbury Railway

^{(1) (1888) 12} Bom. 474 at p. 478.

^{(8) (1876) 2} Q. B. D. 30 at p. 35.

^{(2) (1887) 12} Bom. 490 at p. 495.

^{(4) (1902)} A. C. 165.

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Carriage and Iron Co. v. Riche.(1) For, obviously, the mere bond fide belief that the order might from certain points of view be desirable, will not make the order legal if the person or public body issuing it had no authority or power in that behalf. And, in the present instance, the Municipality, being the creature of the Act under which it is incorporated, has no inherent powers or any authority, except such as may have been conferred by the constating enactments. The Acts define their powers, and any order in excess of those powers, and not authorized by the ordinary law, must be inconsistent with those Acts. Act defines the powers they are to exercise, those powers are thereby limited to what is expressly, or by necessary implication, And enactments trenching on general rights or delegating subordinate legislative or other powers are subject to the principle of strict construction: Maxwell on Interpretation of Statutes, pages 356-357 (2nd Edition). No doubt greater latitude of construction is allowable in respect of discretion in the exercise of powers conferred on public bodies for essentially public purposes, than in the case of bodies incorporated with privileges for their own benefit and profit (Maxwell, 363 and 365, and Brice on Ultra Vires, pages 19, 519). But the Legislature must be understood "in granting away, in effect, the ordinary rights of the subject as granting no more than passes by necessary and unavoidable construction," and "it has been on many occasions and most emphatically decided that private persons must be protected if they possess rights which are being infringed without legislative authority, however disastrous the results of such protection may be to the corporations thus for public purposes injuring private persons": Brice's Treatise on the Doctrine of Ultra Vires, page 518.

The power which the Municipality claimed to exercise in this case is one which they certainly could not exercise independently of the Municipal Acts. For they have no proprietary interests in the site of the building or the space affected by it. Their orders, therefore, if justifiable, must be shown to be consistent with the powers conferred by the Act; otherwise they are neither within the meaning of clause 2 of section 33, nor legal orders

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within the meaning of clause 3 of that section. The land affected not being a public street is not vested in the Municipality by section 17 of the Act, and no general power to interfere with buildings on private property is conferred by any section of that enactment, Such interference would necessarily involve an encroachment on the ordinary rights of the subject. And wherever the Legislature intended to authorize such interference, it conferred the power by apt words. Thus special provision is made in section 25 for the compulsory acquisition of land. Power to interfere in the laying out of the streets was conferred by sections 27 to 29. Section 30, as amended by clause 9 of section 49 of Bombay Act II of 1884, authorized a Municipality to insist on set-backs to the regular line of a public street in the case of houses being rebuilt. Section 31 enabled the Municipality to enforce compliance with a requisition as to the use of noncombustible materials in erecting or renewing buildings. Section 32 enabled them similarly to insist on new buildings being built upon a proper level. Sections 35 and 36 give special powers to regulate the erection of huts. And these sections 35 and 36, relating to merely temporary structures easily removeable and of little value, present a remarkable contrast to the powers conferred in respect of buildings of a more permanent and costly nature. For in the case of huts and sheds the Municipality can interfere with the exercise of private proprietary rights so as to prevent overcrowding and other risks-a power of interference not conceded in respect of the ordinary use of building sites. Sections 36 to 40 enable the Municipality to control private rights in connection with the drainage system, and under section 41 the Municipality may insist on certain provisions being made by owners in public streets for the carrying off of rain-water. Section 42 merits special notice in connection with the present case. For the power which it confers for the removal of projections is expressly limited to the case of projections overhanging or jutting into or in any way projecting into or upon any public street so as to be an obstruction to the safe and convenient passage along such streets or affecting an aqueduct, drain or sewer. And clause 3 of the same section, while enabling the Municipality to give or withhold permission for verandahs and balconies to houses or buildings in public streets, and

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penalising the erection thereof without such permission, makes no provision either for permission or penalty in the case of verandahs or balconies to houses not so situated. Expressio unius est exclusio alterius—and it seems sufficiently clear that no such interference with ordinary proprietary rights was contemplated by the Legislature as desirable, in cases where it was not called for by the necessity of securing the public streets from objectionable structures. Section 43 indicates a similar anxiety on the part of the Legislature to abstain from interference with the ordinary rights of property where there was no necessity arising from the possibility of obstruction or danger to a public road or street or well or tank. Section 48 is a conspicuous instance in which the powers of removal are limited to cases of obstructions, &c., in public streets.

No provision of the Act has been cited to show that the Municipality have a general authority, independently of these carefully limited powers, to prevent any person from building on or over any private site. It is urged that the Municipality may have deemed interference necessary in this case, in order to obviate possible danger from fire, and therefore desired to place an interval between the house of the plaintiff and his next-door neighbour to the east. But, apart from the consideration that in almost every city long rows of contiguous houses are constantly to be found with projecting verandahs, this suggestion as to the good intentions of the Municipality cannot be accepted as a legal justification of their order. For, although the Municipality may have deemed such a power desirable, the Legislature has not deemed it so. And though the Municipality, in any particular ease to which any powers conferred on them extend, may use their own discretion as to whether they should or should not exercise those powers, they cannot usurp the functions of the Legislature and take it on themselves to decide what their powers Had their power been limited, as contended, by their shall be. own discretion alone, there could be nothing to prevent their prohibiting building altogether, and thus depriving owners of the use of their private property. This is certainly not left to their discretion. There must evidently be some limit to their discretionary powers. And no suggestion has been offered as to where that limit is to be found if it is not determined by the

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extent of the powers conferred by the Legislature. It may be noted that in section 149 of the present Act (III of 1901) the Legislature, in conferring wider powers to restrict overcrowding, has provided special safeguards, which require special notifications as to the areas in which and the conditions on which authority to interfere with private rights shall be exerciseable. The case has, however, been treated in the lower Courts as if the Municipality had unrestricted authority to give or withhold permission to build, though as already observed there is nothing throughout section 33 requiring that the permission of the then Municipality should be obtained before building.

Then it is argued that there is no object in requiring notice to be given to a Municipality before building is commenced, if the Municipality cannot withhold permission. But what section 33 authorizes a Municipality to do, is to issue orders not inconsistent with the Act. That is to say, the Municipality cannot prohibit the exercise of a private right which the Act does not empower a Municipality to prohibit, nor can the Municipality permit what the Act does not authorize a Municipality to permit. As already shown, a Municipality is authorized, by section 30 of the Act, to prohibit building beyond the regular line of a street, by section 31 to require the removal of inflammable materials, and by section 32 to determine the level if necessary for drainage. And thus, on the three points of limits, design and materials, as to which clause 1 of section 33 requires information to be furnished, a Municipality can exercise discretionary control, as it can under section 42 and other provisions enabling that body to permit what without such permission would be punishable. All prohibitions and permissions, therefore, issued in accordance with such provisions as are above referred to. are orders not inconsistent with the Act. But orders, proposing to impose such restrictions on private rights as neither the ordinary law nor the special enactment contemplates, would be inconsistent with the Act within the meaning of clause 2 of section 33, and would not be legal orders within the meaning of clause 3 of that section 33.

But it is suggested that the Municipality could rely on what is referred to in the judgments as bye-law No. 7, which purports

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to have been framed under section 42 of the Act. It is manifest, however, that a bye-law cannot enlarge the powers given by or flowing from the Act, the power to frame bye-laws being subject to the condition that they be consistent with the Act (section 32 of Bombay Act II of 1884). And no bye-law or rule could fulfil that condition if it purported to exercise a power which is opposed to the private rights of individuals under the ordinary law and which is not within the limits prescribed by the Act. If it were competent to the Municipality to frame any bye-law not expressly prohibited by the Act, their power would be almost unlimited, and there would be nothing to prevent a Municipality from framing bye-laws or issuing orders in restraint of trade (which would be manifestly illegal: Brice on Ultra Vires, page 56), or from otherwise annihilating private rights. But the powers of Municipalities in this respect are most stringently defined by the Legislature, and therefore a bye-law, though it may restrict. cannot enlarge the scope of Municipal action. But the so-called bye-law purporting to be framed under section 42 of the Act of 1873 (a section which confers no power to make bye-laws at all), is at most a resolution of the Municipality as to the conditions on which and the extent to which it proposes to exercise the powers by that section conferred. Whether it be competent to a Municipality thus to fetter the discretion of its members or successors by self-imposed rules, in lieu of exercising such discretion, as contemplated by the Act, in each case as it arises, may be open to question: The Queen v. Justices of Merionethshire.(1) But in no case could a Municipality take to itself a power by a bye-law, and least of all a power to invade the private rights of individuals under the ordinary law:

Of the cases cited in argument, that of Godhra Municipality v. Heptulabhai⁽²⁾ appears to be at first blush most nearly on all fours with the present. In that case Parsons, J., took the view that the Courts could and should examine the reasons given by a Municipality for an order issued by them under the section now in question, and that if the order proved not to be within the powers conferred by the Act, it would be inconsistent with

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the Act and not a legal order, and would be liable as such to be set aside. The head-note to the case, it may be observed, is somewhat misleading, for it represents, as the result of the decision, certain propositions contained in the judgment of Ranade, J., in which neither Parsons, J., nor Candy, J., concurred. The ground of Candy, J.'s judgment was, it would seem, that the plaintiff's original and reiterated allegation was that the nejwas were placed on the road, that no evidence was adduced on the issue subsequently raised as to whether they were or were not on the road, and the fact, that they were an encroachment on the road, having been admitted in the Court of first instance, the lower Appellate Court had, notwithstanding all this, improperly allowed the new contention that they were not on the road to be set up for the purpose of showing that the order was illegal and should be restrained by injunction. Thus the judgment of Candy, J., implies assent to the view of Parsons, J., that the order would have been ultra vires had it been issued on a notice of a building to be erected on private land. And the concurrence with Ranade, J., was passed expressly on the ground that the order was not ultra vires, because the notice admitted that the building was an encroachment on the public road. Of the other cases cited in argument that of Bhawanishankar v. The Surat City Municipality (1) turned, not on the contravention of orders issued by the Municipality, but on the failure to give notice as to a building on one part of the land actually built upon (see pages 376, 378), a ground of liability which under section 33 (3) is complete in itself and distinct from that which arises from building contrary to legal orders. The case of Dave Harishankar v. The Town Municipality of Umreth, (2) also cited in argument, is for the same reasons irrelevant in the present case. In Nagar Valub Narsi v. The Municipality of Dhandhuka(3) the judgment rested, so far as concerned the building across the passage of the khadki, on the principle that a Municipality is not precluded from exercising its powers by the fact that the protection of the rights of the neighbouring householders might

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have been left to these householders themselves. The Act contemplates that irrespective of all other remedies available to individuals the Municipality may step in to abate nuisances in certain circumstances, and the judgment in question decides only that the possibility of other remedies does not deprive it of such power. It did not consider or determine the question whether the order complained of was on other grounds beyond the powers conferred by the Act, and there was no discussion in the judgment or in the reported arguments as to what were the powers conferred by the Act. It was indeed laid down in the judgment, citing Geddis v. Proprietors of Bann Reservoir, (1) that "a public body must keep within its powers." But none of the sections conferring powers were referred to, and the only objection considered was whether a power not disputed would be in abeyance merely by reason of the fact that the rights infringed might have been adequately protected by private persons availing themselves of remedies afforded by the ordinary law. when the existence or extent of a power claimed is distinctly challenged, the strictness with which the Courts will construe the provisions of the Act appears from the following cases: Kalidas v. The Municipality of Dhandhuka, 2 Ahmedabad Municipality v. Manilal Udenath(3) and the same case after remand, (4) Ankleshvar Municipality v. Rikhavchand (5); cf. Essa Jacob v. Municipal Commissioner of Bombay, (6) and Queen Empress v. Harilal, (7) and Queen Empress v. Veerammal. (8) Lastly, it is to be noted that in the case of Patel Panachand Girdhar v. Ahmedabad Municipality, (9) cited for the respondent, the liability of a building to removal under section 33 of the Act of 1873 was considered with regard to two of the three grounds specified in that section, viz., first, with reference to the general power of the Municipality at discretion to forbid building, and secondly, with reference to the allegation that building had been commenced without previous notice given as

^{(1) (1878) 3} A. C. 430.

^{(2) (1882) 6} Bom. 686.

^{(3, (1894) 19} Bom. 212.

^{(4) (1894) 20} Bom. 146.

^{(5) (1900) 25} Bom. 315.

^{(6) (1900) 25} Bom. 107.

^{(7) (1889) 14} Bom. 180.

^{(8) (1892) 16} Mad. 230.

^{(9) (1896)} P. J. p. 296; 22 Bom. 230,

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required by clause 1 of section 33. And the judgment shows that while the discretion of the Municipality to order removal of a building erected without notice cannot be questioned by the Courts, because that power is expressly vested in the Municipality by clause 3 of section 33, the power to require removal in any other case must depend on whether the orders contravened were legal, and in that case depended on whether the site built on was vested in the Municipality as a public street, and issues were framed accordingly. Of course, if the building had been erected in any manner contrary to the express provisions of the Act or contrary to the orders of the Municipality on any matter in which the Act expressly leaves it to the Municipality to issue orders of prohibition or permission, then the power to require removal would have been equally exerciseable by the Municipality as the third of the three conditions specified in clause 3 of section 33 would then have been satisfied. It is not alleged here that the building in question was erected either without notice required by clause 1 or contrary to the provisions of the Act, or contrary to any orders on any matter as to which the Municipality was empowered by the provisions of the Act to give or withhold permission at discretion. And as it is not denied that the land is private property, the Municipality cannot interfere on the ground that the land affected is vested in them. The orders issued were, in my opinion, therefore inconsistent with the provisions of the Act, as being in excess of the powers which it authorized the Municipality to exercise.

In the view I take of the case, the decree of the lower Appellate Court should therefore be reversed and the plaintiff's claim should be allowed with costs throughout. My learned colleague, however, differs from me, and procedure under section 575 of the Code of Civil Procedure is therefore necessary.

ASTON, J.:—The order in respect of which the appellant has sued for a perpetual injunction restraining the Ahmedabad Municipality from removing a dakhlee or projecting balcony two feet wide (and five feet long) attached to his house and one foot six inches from the width of eaves of his house, is an order of 26th April, 1899, of the Ahmedabad Municipality made under clause 3, section 33, following one under section 33, clause 2, of

the District Municipal Act (Bombay Act VI of 1873), giving permission to the plaintiff to construct his *dakhlee* on the north, two feet wide, after leaving five feet of space commencing with the extremity of the plaintiff's eastern wall.

The plaintiff in contravention of this order constructed a dakhlee two feet wide without leaving five feet of space required by the order, and made eaves $1\frac{1}{2}$ feet wide further overhanging the ground of the khadki below, and was required by the Municipality by notice under clause 3 of section 33 of the Act to remove the projection including the dakhlee two feet wide and eaves $1\frac{1}{2}$ feet wide, in all $3\frac{1}{2}$ feet, constructed without leaving the five feet of space from the east on the north. There is no contention that the ground under this projection belongs to the plaintiff.

The plaintiff has so constructed his dakhlee as to leave only $1\frac{1}{2}$ feet space between it and a house of a neighbour to the east.

The Municipality have made under section 42 of the Act a standing rule that permission will not be granted to make a new dakhlee within eight feet of an opposite house.

The contention in the plaint was that the dakhlee has not been made so as to overhang a street or a public street. Later on the plea was set up that the dakhlee was made under the direction of defendants' servant Motilal, and when this was held untrue, a plea of acquiescence by defendant was set up in the lower Appellate Court.

At the hearing of the present second appeal, a point not mentioned in the grounds of second appeal was raised, that the order of the defendant Municipality is ultra vires because it is an invasion of private proprietary rights and is therefore not a legal order within the view of clause 3 of section 33 of the Act even though it may be an order not inconsistent with the Act.

Section 33 of the Bombay District Municipal Act (Bombay Act VI of 1873) refers to new buildings without any mention in the section of public streets. And clause 2 of the section says "within one month after receiving such notice the Municipality may in writing issue such orders not inconsistent with this Act as they think proper with reference to such building." The words "may in writing issue such orders not inconsistent with this Act as they think proper with reference to

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such building" are very wide, and read, as they exist in this section, give elastic powers to the Municipality in the matter of regulation of new buildings on private property, and there is no reference to a street, public or private, in the section.

In the very next section 34 which deals with the regulation of huts, a Municipality is authorized to require new huts or sheds to be built with a free passage or way in front of and between every two lines of such width as the Municipality may think proper for ventilation and to facilitate scavenging. This and other provisions of the Act show that ventilation is one of the matters which the Act makes the care and concern of a District Municipality and a matter to secure which the public authority of a public body constituted under the Act may be properly invoked even though a private neighbour may have a civil remedy in the Civil Court.

It has not been contended that the order complained of is inconsistent with the Act.

But it is contended that the words "may issue such orders not inconsistent with this Act as they think proper with reference to such building " in clause 2 of section 33 are so wide that they would, if taken too literally, authorize unlimited interference with private rights of property, which would be an unreasonable intention to impute to the Legislature, and therefore the actual words of the clause should be read as if this clause said "may issue orders to enforce the provisions of any other section of this Act, if applicable under any other section, to such new building." To support this contention the introduction of the word "legal" before "orders of the Municipality" in clause 3 of the same section is relied upon. This argument raises two serious difficulties. The first is that it begs the question, for it is impossible to contend that an order legal under clause 2 of section 33 can be less legal than an order legal under any other section of the Act. The second difficulty is that if the order referred to in clause 2 can only be legal if it repeats some express provision made applicable to such new building by some other section of the Act, then the greater portion of section 33 is wholly superfluous, for the Municipality may under the last part of section 33 require the building to be altered or demolished

if made contrary to the provisions of the Act, and therefore we should not expect to find the first part of clause 3 of section 33 worded as it is if the only legal order a Municipality can pass under clause 2 of section 33 is an order repeating the prohibitions in express provisions elsewhere contained in the Act, for instance, as to combustible materials, level, drainage and discharge of sewage—provisions which can be enforced without invoking the aid of section 33 of the Act.

I am not aware of any recognized canon of interpretation which would justify the construction that whilst clause 2 gives legal power to a District Municipality to "issue such orders not inconsistent with this Act as they think proper with reference to such building," the introduction of the word "legal" before "orders of the Municipality" in clause 3 constitutes an invitation to the builder to disobey a statutory order passed under clause 2 if such order infringes any private right subsisting when the Act came into force.

It appears improbable that the Legislature would in clear terms invite a Municipality to make orders supplementing the express provisions of the Act but not inconsistent with the Act, and at the same time invite disobedience of such orders and encourage litigation at the cost of rate-payers, if by going outside the Act such orders made under the statutory power explicitly conferred can be contested as illegal.

In the Godhra Municipality case (The Godhra Municipality v. Heptulabhai⁽¹⁾) it was remarked by Ranade, J. (at page 582): "It is obvious that Municipal Government would be impossible if a man acts on his own view of matters in regard to which the Municipality has a full discretion," under section 33 as decided in Nagar v. The Municipality of Dhandhuka⁽²⁾; and Candy, J., in the same Godhra Municipality case⁽³⁾ observed: "To borrow the language used by Mr. Justice Ranade, it is obvious that the Municipal Government would be impossible, if a man can say, 'Give me permission to put up balconies projecting on a public road,' and then when permission is refused, he can ignore the orders and put up the balconies, because in his view the

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Municipality had acted arbitrarily." If an order made under clause 2 is "not inconsistent with this Act" according to the proper construction to be put upon those words, when the recognised canons of interpretation are followed, then in the view I take of the matter the order so made is a legal order.

The question then is, what is the proper interpretation to be put on the words "not inconsistent with this Act"?

"General words and phrases, however wide and comprehensive in their literal sense, must be construed as strictly limited to the immediate objects of the Act and as not altering the general principles of the law": Maxwell on Interpretation of Statutes, page 96,2nd Edition. "Statutes which encroach on the rights of the subject, whether as regards person or property, are subject to a strict construction. It is presumed that the Legislature does not desire to confiscate the property or to encroach upon the rights of persons, and it is therefore expected that if such be its intention it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt" (ibid, page 346). "The same principle of construction is applied to enactments which create new jurisdictions or delegate subordinate legislative or other powers" (ibid, page 357).

Nevertheless, "the effect of the rule of strict construction might almost be summed up in the remark that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject, and against the Legislature which has failed to explain itself. But it yields to the paramount rule that every statute is to be expounded according to the intent of them that made it, and that all cases within the mischiefs aimed at are held to fall within its remedial influence" (ibid, page 345).

"It is said to be the duty of the Judge to make such construction of a statute as shall suppress the mischief and advance the remedy, and the widest operation is therefore to be given to the enactment so long as it does not go beyond its real scope and object" (*ibid*, page 84).

Again, "the words of a statute are to be understood in the sense in which they best harmonize with the subject of the

enactment and the object which the Legislature has in view" (ibid, page 67).

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"It is to be taken as a fundamental principle, standing as it were at the threshold of the whole subject of interpretation, that the intention of the Legislature is invariably to be accepted and carried into effect, whatever may be the opinion of the judicial interpreter of its wisdom or justice" (ibid, page 65). "It is an elementary rule that construction is to be made of all the parts together and not of one part only by itself" (ibid, page 35).

"In the interpretation of statutes, the interpreter, in order to understand the subject-matter and the scope and object of the enactment, must, in Coke's words, ascertain what was the mischief or defect for which the law had not provided " (ibid, page 30).

"To arrive at the real meaning it is always necessary to take a broad general view of the Act, so as to get an exact conception of its aim, scope and object The true meaning of any passage is to be found not merely in the words of that passage, but in comparing it with every other part of the law, ascertaining also what were the circumstances with reference to which the words were used, and what was the object appearing in those circumstances which the Legislature had in view " (ibid, page 27). But "to give it a construction contrary to or different from that which the words impart or can possibly impart is not to interpret the law but to make it" (page 7), for "statute law is the will of the Legislature, and the object of all judicial interpretation of it is to determine what intention is conveyed, either expressly or by implication, by the language used, so far as it is necessary for determining whether the particular case or state of facts presented to the interpreter falls within it" (page 1). And "though vested rights are divested, and acts which are perfectly lawful when done are subsequently unlawful by a statute, those who have to interpret the law must give effect to it '' (ibid, page 5).

In the case of Ollivant v. Rahimtula (1) it was pointed out that where an Act gives power to a Municipality or corporation for the public benefit, a more liberal construction should be

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given to it than where powers are to be exercised merely for private gain or other advantage.

Now the public health is a matter which must be the concern of a Municipality, and bearing in mind the recognized canons of interpretation above quoted, and reading the whole Act, I think that the Legislature has in explicit terms indicated its intention to provide a remedy against fresh obstructions to proper ventilation in municipal areas. This plainly comes within the scope and object of the Act. In the case of new huts and sheds this is specially provided against (section 34), but as to more pretentious new buildings the evil is provided against by the more elastic method of conferring statutory power on a District Municipality to make orders "not inconsistent with the Act," and supplementing the provisions elsewhere enacted in the Act.

The words "not inconsistent with this Act" therefore appear to me to mean not inconsistent with the aim, scope and object of this Act as shown by its provisions. The order complained of seems to be aimed against an evil which the Act has intended to remedy and to fall within the scope and object of the Act and within its remedial purpose.

The view that the Legislature has given a Municipality statutory power as regards new buildings on private sites to supplement the provisions elsewhere contained in the Act, and intended so to do, is supported by a careful examination of section 33. Such examination will show that even if a builder give all the requisite information to the Municipality and receive no reply, he proceeds with the building at his own risk of having it demolished if he contravenes any of the provisions in other sections of the Act. Therefore section 33 does not mean that a builder must receive warning before the step is resorted to of demolishing a new building which contravenes some provision elsewhere enacted in the Act. The deduction seems obvious that the legal order of the Municipality for which section 33 provides, a contravention of which may also lead to a demolition of the new building, may be an order supplementing the provisions elsewhere enacted in the Act, though such order must be not inconsistent with the Act.

That bye-laws legally made by a Municipality may be used for the purposes of section 33 to supplement the express provisions

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of the Act is pointed out in the Godhra Municipality case (The Godhra Municipality v. Heptulabhai (1)) by Parsons, J., who considered that the first clause of section 33 "shows some of the matters in respect of which orders can be passed," that "there are other sections which mention other matters," and that the orders that can be legally issued by a Municipality under section 33 are intended only to ensure that the new building shall not offend against the requirements of the Act "or such bye-laws as the Municipality may have legally made."

Further, as to the argument that the authority given to a Municipality by clause 2 of section 33 to "issue such orders not inconsistent with this Act as they think proper with reference to such building" should be read as authority "to issue legal orders in accordance with the provisions of any other sections of the Act as to such building." I may remark that our attention has not been invited to any other express provisions of the Act covering such a case as the present, namely, making a new balcony projecting over a street not a public street, or over ground outside the builder's premises, though, if the new balcony and eaves overhang a public street, they would come under another section (42) and could be dealt with under sections 74, 75 and 77 without invoking the provisions of section 33.

The District Municipal Act is a Code of District Municipalities' law, and it is to be remembered that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction.

If a Municipality cannot ascertain by examining the Municipal Act itself whether it has authority to issue a proposed order regarding such a new structure as this one, where is it to look for the law on the matter? If that authority is conferred by some law other than the Municipal Act itself, then clause 2 of section 33 is superfluous. If that authority is conferred by the Municipal Act as to new buildings not in a public street, then it is conferred by section 33 and in the words used by the Legislature in clause 2 of section 33. And if the order issued

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comes within the authority conferred by those words of the Legislature properly interpreted, then the order must be a legal order even though it may restrict, in a populous area for which general conservancy regulations have been enacted by the Legislature and within the limits imposed by the terms in which such statutory authority is conferred, the exercise of proprietary rights which outside municipal areas may be unfettered.

In the case before us, however, it is to be noted that the plaintiff's balcony is described as projecting beyond the line of his premises so as to overhang ground decided to be a street, and to leave 1½ feet of space between the balcony and the neighbour's house to its east.

As to the argument that because section 42 makes provision for removal of projections over public streets, therefore it was intended by the Legislature that new projections over streets not public must be allowed, I think that section 33 deals with a different set of circumstances, and the maxim expressio unius est exclusio alterius cannot apply. On the contrary, it seems to me that section 42 affords a suggestion how the statutory power conferred by section 33 can be exercised in respect of new projections over streets not public.

The locality where the plaintiff's site is situated is a "khadki" which comes under the definition of a street (section 3 of the Act) if the public use it as a means of access, though not a public street. I am far from convinced that the decision in Nagar v. The Municipality of Dhandhuka (1) does not bind us in the But even if it does not bind us, it, in my opinion, present case. fortifies the conclusion at which I have arrived, that the words "not inconsistent with this Act" in clause 2 of section 33 constitute a restriction that the orders under clause 2 must conform to the scope of the Act and to its specified objects, but need not be necessarily confined to a prohibition contained in a specific provision in some other section of the Act. It is sufficient if the circumstances are within a mischief aimed at by the Act and the order under clause 2 of section 35 does not go beyond its remedial purpose, and does not contravene any express provision of the Act. Under this view, if correct, section 33 is in itself an elastic

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provision supplying a remedy for evils aimed at in other sections of the Act but not provided against elsewhere in the Act in respect of new buildings not in a public street, but of the nature under consideration. So that the statutory power conferred by section 33 may be exercised to supplement the explicit provisions elsewhere enacted in the Act, but not in a manner inconsistent with the Act.

In Nagar's case (1) the plaintiff was the owner of two houses on each side of the passage of a khadki or open square (not a public street) containing three or four other houses. He proposed to connect the two houses by building a storey across the passage at such a height as not to interfere with the passage of those who were entitled to go to and fro. He applied to the Municipality for permission to build in the manner he proposed. The Municipality refused on the ground that the proposed structure above the passage was likely to interfere with the access of light and air to the neighbouring houses (in the khadki) and that the balcony would be an encroachment on a public street (outside).

The Judges who decided that case (West and Birdwood, JJ.) held, so far as the structure over the passage was concerned, that the authority of the commissioners to refuse permission because the proposed structure was calculated to interfere with the access of light and air to the houses inside the khadki was not in any way affected by the circumstance that the proposed erection might be an encroachment on private rights, subjecting the plaintiff to an action by the persons injured: and that the suit against the Municipality would not lie as the order under the circumstances of the case was not an unreasonable one. It was further decided that section 33 of the Bombay District Municipal Act (Bombay Act VI of 1875) gives the Municipality a discretion to issue such orders as it thinks proper with reference to a proposed building. Civil Courts cannot interfere with that discretion unless it is exercised in a capricious, wanton and oppressive manner.

It may be said that the above construction is very wide. It is, however, sufficient for my purpose to observe that the interpretation which I have already suggested, and the one I would prefer

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if the above decision (I.L. R. 12 Bom. 490) leaves the matter still open, is a far narrower one, but nevertheless covers the circumstances of the case before us.

It is necessary to emphasize the dual character of the structure which was not allowed by the decision in Nagar v. The Municipality of Dhandhuka. Part of the structure projected over a public street, but part did not, and was a flying structure over the ground of a khadki (or court) made to connect two different premises of the plaintiff between which the khadki ground intervened. The order of the Municipality that both were to be removed was upheld by this Court for the reasons given in that decision. This feature was not mentioned by Parsons, J., when he cited this decision in the later case of the Godhra Municipality v. Heptulabhai, and is omitted from the résume of the case given by Candy, J., at page 584 of the same case, where he said the Municipality refused permission to erect "the encroachment on the public road."

The head-note in the report of the Godhra case does not accurately state the ground on which Candy, J., agreed with Ranade. J., in refusing to interfere with an order of the Godhra Municipality objecting to the erection of a balcony which in fact did not project beyond the defendant's own land. The case appears to have actually been decided on a side issue, not arising in the present case. It is true that in the Godhra Municipality case Parsons, J., said as to section 33, "the orders that legally can be issued by a Municipality under that section nowhere extend to the issue of a prohibition to a person not to build on his own land, but are strictly limited to the issue of orders in accordance with the provisions of the Act," but the learned Judge qualified these words by adding the words I have already quoted: "and are intended to ensure that he shall so build as not to offend against the requirements of the Act or such bye-laws as the Municipality may have legally made," thereby showing that he did not exclude clause 2 of section 33 from the provisions of the Act and recognized that an order made by a Municipality under the statutory power conferred by clause 2 of section 33 can legally supplement the provisions elsewhere contained in the

Act. Otherwise the words of Parsons, J., "or such bye-laws as the Municipality may have legally made" would be meaningless.

What appears specially to be noticed in the Godhra Municipality case⁽¹⁾ is, that the construction to be placed on clause 2 of section 33 was considered by the three Judges who decided that case, that all the three learned Judges took the words of the clause as they stand without suggesting that the word "legal" should be introduced before the words "orders not inconsistent with this Act as they think proper with reference to such buildings," and that in all the three judgments the decision in Nagar v. The Municipality of Dhandhuka⁽²⁾ is relied upon, but without notice being taken in two of the judgments of the dual nature already pointed out of the structure prohibited in that case.

Various decisions bearing on the point are discussed in the judgment recorded by Ranade, J., in the Godhra Municipality case⁽¹⁾ and I need not discuss them again.

I have dealt at length with the considerations which appear to establish the legality of the order in question under the Act of 1873, because it is possible that many such orders have been made by District Municipalities under that Act and the question whether such orders were legal under that Act must therefore be a serious matter.

I think that the decision in Nagar v. The Municipality of Dhandhuka⁽²⁾ governs the present case. If it does not, then for the reasons already stated, I think that on a true construction of clause 2 of section 33 of that Act of 1873 the order complained of is not inconsistent with that Act and is a legal order which the Municipality had authority under this clause to make. If the matter rested there, then the injunction prayed for should be refused. But the order has not yet been enforced and meanwhile another District Municipal Act has been passed and came into force on 1st April, 1901 (Bombay Act III of 1901). The repeal of the District Municipal Acts of 1873 and 1884 does not affect the validity or the invalidity of anything already done under either of the said enactments (see section 2 of Bombay Act III of

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1901), but the enforcement of the order may well be stayed if such an order, as the order complained of is made after Bombay Act III of 1901 came into force, would be inconsistent with the latter Act: in other words, if a District Municipality has no power under the present Act (Bombay Act III of 1901) to prohibit such a building, for in such case the appellant could not be prevented by the Municipality from re-erecting the same balcony and eaves.

Section 33 of the old Act is reproduced in an altered shape in section 96 of the new Act, yet the words "the Municipality may issue such orders not inconsistent with this Act as they think proper" are retained by the Legislature notwithstanding the construction put upon those general terms in the case of Nagar Nevertheless such an v. The Municipality of Dhandhuka.(1) order, though consistent with the Act of 1873, would not be consistent with the present Act (Bombay Act III of 1901) if the ground over which the appellant's balcony and eaves project is private property, for in section 122 of the present Act there is express provision not only as to obstructions and encroachments upon public streets (see section 42 off the Act of 1873), but an added provision as to such obstructions and encroachments upon open spaces with an express exemption in clause 2 of section 122 of the present Act from this added provision where the open space is private property.

It has been decided by the lower Courts that the ground over which the appellant's balcony and eaves project is a street. It has been conceded by respondent's pleader that it is not a public street. This leaves it still undecided whether it is private property.

I would, therefore, remand the case for decision of the issue whether the ground over which the appellant's balcony and eaves project to the extent of 3½ feet is private property, as the question whether the order of the Municipality should still be enforced must turn, I think, upon the finding on that issue.

Owing to the above difference of opinion, the case was referred under section 575 of the Civil Procedure Code (Act XIV of 1882) to Mr. Justice Chandavarkar.

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Ratanlal Ranchhoddas for the appellant (plaintiff):—We contend that the Municipality has no right to interfere with the plaintiff's balcony. The street over which it projects was found by the lower Courts to be a private street. It is only the public streets that are vested in the Municipality: see section 17 of Bombay Act VI of 1873. The Act contains no provision enabling the Municipality to interfere in the case of a private street. Section 42 refers only to projections over public streets: see also sections 27, 30, 41, 43, 47, 48. Where it is intended to give the Municipality power to interfere in the case of private streets, the Act uses the words "any street": see sections 37, 45, 46, 49, 50, 51, 53, 54.

Clause 3 of section 33 does not apply here. It only applies where the conditions of clause (1) are violated. That was not so in this case as the plaintiff gave the required notice.

The Municipality has no powers except those expressly given by the Act which creates it. The case of Godhra Municipality v. Heptullabhai⁽¹⁾ does not apply. In that case Parsons and Ranade, JJ., differed as to the law; and Candy, J., agreed with the proposed decree only having regard to the nature of the pleadings and to the fact that the balcony in question projected over a public street.

L. A. Shah for the respondents (defendants):—The Municipality in this case has acted under section 33 of the Bombay District Municipal Act (Bombay Act VI of 1873). The orders passed by the Municipality are justified by the terms of section 33. The section refers to "any building" and makes no mention of public street or private street. Clause 1 of the section requires any person intending to build a house to give notice to the Municipality. But he is also required to obey the orders which the Municipality may issue upon receiving his notice. If a man is permitted to disobey such orders, there is no object in requiring an intending builder to give notice of his intention to build, &c., and section 33 would be meaningless.

The powers of a District Municipality to regulate the construction of buildings in a private street have been recognized by

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this Court in previous cases, viz., Godhra Municipality v. Heptulabhai⁽¹⁾; Nagar Valab v. Municipality of Dhandhuka⁽²⁾; Municipality of Thana v. Fazal Karim⁽³⁾; Bhawanishankar v. Surat City Municipality⁽⁴⁾; Dave Harishankar v. Municipality of Umreth.⁽⁵⁾

CHANDAVARKAR, J.:—The finding of the lower Appellate Court in this case is that the plaintiff has erected the balcony in dispute contrary to an order issued by the Municipality under a bye-law framed under the Bombay District Municipal Amendment Act (Bombay Act II of 1884).

It is contended for the plaintiff in this second appeal that as the balcony abuts on a private, not a public, street, the Municipality has no right to interfere with it. It is admitted for the Municipality that the building of which the balcony is a part abuts on a private street. The balcony is a projection of the building and must be taken to be a part of the building itself. "A projection from a building means a part of a building projecting or jutting out; it means a prominence extending from the building in the sense of coming out from the building as part of the building": per Bruce, J., in Hull v. London County Council. (6) The only question, therefore, is whether the order was within the jurisdiction of the Municipality under the provisions of the Bombay District Municipal Act of 1873. Mr. Justice Batty has held that it was not. Mr. Justice Aston has taken the contrary view. The second appeal has, under these circumstances, been referred to me for disposal under section 575 of the Code of Civil Procedure.

The contention of the Municipality is that its order falls properly within section 33 of the Act. The first clause of that section says: "Before beginning to erect any building, or to alter externally or add to any existing building, the person intending so to build, alter or add, shall give to the Municipality notice thereof in writing." By such notice he is required, among other things, to furnish to the Municipality "all information they may require

^{(1) (1900) 2} Bom. Law Reporter 572.

^{2) (1887) 12} Bonn. 490.

^{8 (1901) 3} Bom. Law Reporter 842.

^{(4) (1895)} P. J. p. 375.

^{(5) (1893) 19} Bom. 27.

^{(6) (1901) 1} K. B. 580 at p. 588.

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regarding the limits, design, and materials of the proposed building." Clause 2 of the section says that "within one month after receiving such notice the Municipality may in writing issue such order not inconsistent with this Act as they think proper with reference to such building." Clause 3 says that if any person erect such building "without the notice, or without affording the information above prescribed, or in any manner contrary to the legal orders of the Municipality issued within the period abovesaid or in any other respect contrary to the provisions of this Act," he shall be liable to a certain penalty and "the Municipality may, by written notice, require such building to be altered or demolished as they may deem necessary."

Reading the whole of this section by itself, and having regard to its general terms, it is clear that the Legislature has given to every Municipality the power to regulate the construction of buildings, whether they abut on a public or a private street. The power may be exercised as the Municipality "think proper." which means that it should be exercised, not capriciously or arbitrarily, but reasonably (Rex v. Wilkes(1); Marshall v. Pitman(2)). provided the order is "not inconsistent with the provisions" of the Act. In construing section 33 a good deal turns upon the meaning of the words " not inconsistent with the provisions " of the Act. To that I will address myself presently, but it is clear that if the action of the Municipality taken under the section is not inconsistent with the provisions of the Act, it will be legal provided it is reasonable. The question what is a reasonable exercise of such power must depend upon the character of the body acting on the delegated authority of the Legislature, upon the subject-matter of such legislation, and the nature and extent of the authority given to deal with matters which concern it. As observed by Lord Russell of Killowen, C.J., in Kruse v. Johnson (3) (which has been approved in subsequent decisions, as an instance of which I may cite Gentel v. Rapps(4)), if the byelaws of a public representative body "were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they

^{(1) (1770) 4} Burr. 2527 at p. 2539.

^{(2) (1833) 9} Bing. 601.

^{(3) (1898) 2} Q. B. p. 91.

^{(4) (1902) 1} K. B. 160.

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involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say: 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.' But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A bye-law is not unreasonable merely because particular Judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by qualification or an exception which some Judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local Government bodies, such representatives may be trusted to understand their own requirements better than Judges." I have made this citation from the judgment of the late Lord Chief Justice of England because the action of the Municipality, which is complained of as illegal in this case, was taken under a bye-law made by it under section 33, clause (e), of the Bombay District Municipal Amendment Act, 1884, which empowered it to make bye-laws consistent with that and the principal Act with the previous sanction of the Governor in Council, "generally for the regulation of all matters relating to municipal administration."

Section 33, then, read by itself must be construed as giving power to the Municipality to regulate the erection of all buildings, whether abutting on a public or a private street. The first limit to the exercise of that power is that it should be exercised reasonably. Clause 2 of the section provides another limit, which is that it should be exercised in a manner "not inconsistent with this Act." Clause 3 requires that the exercise of the power should be either "legal" or not "contrary to the provisions" of the Act. Those are the only limits to the exercise of the power. If any one erects a building "in any manner contrary to the legal orders of the Municipality or in any other respect contrary to the provisions" of the Act, the Municipality may under clause 3 by written notice require him to alter or

demolish the building, "as they may deem necessary." It follows, then, that if an order is contrary to or inconsistent with the provisions of the Act, it cannot be legal.

The first question then is, is the order issued by the Municipality a violation of any general law? The general law is that no man should be hindered in the exercise of any of his private rights, unless the Legislature has by any enactment taken away the right or put a limit to its exercise. Has the Legislature put any such limit to the right of a man to build as he likes? The answer to that depends on the question, what is the character of the body which has passed that order; with what object was it created; what is the subject-matter of the statute which created it and gave it that character; and with what powers did the Legislature arm it? It is a public representative body, created for the purposes of public health and sanitation; the Act gives it the power of regulating the erection of buildings towards that end; the Act, moreover, has armed it with the power of making rules or bye-laws for giving effect to that power. Now the law as to the interpretation of such' Acts and bye-laws framed under them has been explained by Lord Russell of Killowen, Chief Justice, in the judgment to which I have already referred. and that law, to quote his words, says that in the case of such a body its rules "ought to be supported, if possible. They ought, to be, as has been said 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. This involves the introduction of no new canon of construction." It is true that section 33 does not in so many words say expressly that a Municipality has the power of preventing a man from erecting a building beyond certain limits. We have to infer that power from the terms of the section and the power given to regulate the erection of any building; and the inference must be drawn only if it is justified by the terms and is not against the argument of reasonableness and common justice. "When you are asked to infer a thing, I think the argument of reasonableness has, and ought to have, very great weight. What has sometimes been called the argument of common justice ought also to have great weight: you are not to infer an alteration of the general law if

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that alteration be against common justice: it would require very strong words to lead to such an inference. I say that, because that must be a consideration in reading enactments" (per Jessell, M.R., in In re Pigot and The Great Western Railway Company (1)). Construing section 33 by the light of this canon of construction it would perhaps be unjust to infer from it that the Legislature intended to alter the general law by empowering a Municipality to prevent a man arbitrarily from building on his own landthat would be unreasonable and against common justice; but it is neither unreasonable nor against such justice to infer that the Legislature intended to alter that law in the interests of public health and sanitation by empowering the Municipality to control the erection of buildings in a reasonable manner. The terms of the section are wide enough to justify that inference. The only limit to the power given in such cases, then, by section 33 is that prescribed, firstly, by the general law that all such power should be exercised reasonably, not capriciously, and, secondly, by the section itself that it should not be inconsistent with or contrary to the provisions of the Act itself.

That the Municipality has exercised the power pareasonably has not been contended in this case. The argument for the plaintiff is that the power is inconsistent with and contrary to other provisions of the Act itself. The first provision of the Act which is relied upon as negativing the power of the Municipality is section 42. The argument based upon that section is that, as the Legislature has expressly provided against encroachments on public streets by giving a Municipality the power to remove them, it must be taken to have denied similar power as to encroachments on streets which are not public. At first sight I was much struck by the force of the argument, especially because under section 42 if an encroachment be made on a public street in the shape of a building or otherwise either overhanging the street or projecting into it, the Municipality can have *it removed and may, in its discretion, give compensation to the person who made the encroachment lawfully. the Legislature intended to give similar power as to other

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encroachments, why has it not said so? Would it have left the power to be given by the general terms of section 33, without providing for compensation in terms similar to those in clause 2 of section 42? The argument is, however, plausible. Before we infer that the affirmative enactment in section 42 carries with it the implied negative as to section 33, and that, therefore, an inconsistency will arise between the two sections if we construe section 33 as giving the power to a Municipality to define the limits of a building abutting on a street which is not public, we must see what is the object and scope of each of the two sections and the mischief which each was intended to strike at. If both deal with the same subject-matter, then it may perhaps be fair to argue that we must avoid a construction of section 33 which will conflict with section 42, and that the principle expressum facit cessare tacitum must apply. But do they deal with the same subject-matter? Section 42 relates primarily to encroachments upon or obstructions to public streets, not to buildings. A building may be an encroachment or obstruction, but that is only an incident, so far as this section is concerned. The thing dealt with or intended to be dealt with as the principal subject-matter of the section is an encroachment or obstruction on a public street. The Legislature says none shall encroach upon or obstruct public streets if the Municipality so desire it. These streets are municipal property, being vested in the Municipality under section 17. The Legislature says that the Municipality shall have the power to say that no one can have the right to encreach upon or obstruct them, because they belong to the Municipality. The mischief intended to be struck at is interference with the ownership of the Municipality. Section 33 deals with a different thing altogether. It deals primarily with the erection of buildings, not with encroachments or obstructions. A building may be an encroachment or obstruction, but it is not because it is such that it falls within section 33. Its character as an encroachment or obstruction is only incidental. The mischief intended to be struck at by section 33 is that arising from the erection of buildings without proper regard to public health and sanitation. To prevent that mischief the Legislature says. that the Municipality has the right of regulating the erection. The subject-matter,

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the object and the scope of section 42 are different from those of section 33, and therefore there can be no inconsistency or repugnance between them.

Section 42 being, then, out of consideration, are there any other sections in the Act which are inconsistent with and contrary to the construction which, I think, the words and spirit of section 33 justify being put on it? Mr. Justice Batty has answered the question in the affirmative. He relies upon sections 25, 28, 29, 30 to 32, 35 to 43 and 48. Section 25 empowers Government to acquire land under the Land Acquisition Act or other existing law and vest it in the Municipality. It cannot have any bearing on the right of the Municipality to control the erection of buildings. So also sections 28 and 29, which deal with the power of a Municipality to lay out new public streets, &c. Section 30 relates to buildings which project into a public street, and empowers a Municipality to take possession of so much of the space occupied by them as can bring it into the regular line of the public street when the building has been taken down or burned or fallen down. This section is only a reiteration of section 42, except that under section 42 the Municipality may have the projection removed suo motu, whereas under section 30 the removal contemplated is the result of an act of the owner or an accident. It does not help us in the construction of section 33. It is said, however, that there is a connection between section 33 and sections 30 to 32 in this way: section 33 requires that a person who begins to erect a building shall give information to the Municipality regarding its level, limits, design, and materials; section 30 points out the limits; section 31 the materials; and section 32 its level. But as to section 30, the object is to widen public streets and bring the buildings abutting on them in a regular line. Section 33 deals with the limits of any building whether it abuts on a public street or not. If the object of getting information regarding the limits of a proposed building under section 33 were confined to that of section 30, where was the necessity of section 33 at all? The Legislature had already provided by section 30 and section 42 for buildings projecting into public streets; there was then no occasion for an additional section empowering the Municipality to require information

regarding the limits of other buildings. The Legislature would have in that case restricted section 33 to the class of buildings contemplated by sections 30 and 42. Then again, if sections 31 and 32 were framed with special reference to "the materials" and "the level" of a proposed building dealt with in section 33, why did the Legislature, after particularly prescribing in section 32 the proper level upon which a house or building should be built, go on to say in section 33 that the person building should give information "showing the levels at which the foundation and lowest floor of such building are proposed to be laid by reference to some level known to the Municipality"? The level pointed out in section 33 is not necessarily the level pointed out in section 32. Section 34 relates to the regulation of huts, and section 35 to the danger from overcrowded or badly drained huts or sheds used as dwellings or stables or for other purposes. The provisions as to huts are, no doubt, more specific than the provision in section 33 as to buildings, but it is obvious why the Legislature was more particular about the one than about the other. The danger from huts is greater than from buildings, and therefore the discretionary power given as to the former has been particularised. All that can be inferred from that is that the discretionary power given as to huts was perhaps intended to be wider than that given as to "buildings"; but it cannot be inferred that there is no discretionary power at all as to the latter. It may be, for instance, that as to buildings the Municipality cannot require that they should stand in regular lines, &c., and that they should not be overcrowded as they can in the case of huts. It is only to that extent that the argument based on the sections as to huts can go: but it cannot go the length of denying all discretionary power as to buildings under section 33; and if that section gives some discretionary power, the question is "what is its extent?" which must be decided, as I have said, by reference to the question of reasonableness. I pass on then to the sections in the Act (36, 37, 41) which relate to "buildings" in general, whether they abut on public or private street. It is these sections which seem to create some difficulty and to support the view taken by Mr. Justice Batty. These are sections which empower the Municipality to require the owners of buildings to provide for them

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privies or cesspools and sufficient drainage. It is argued that the specific mention of these powers implies the exclusion of power to control the erection of buildings with reference to other matters. But when a statute gives by one section discretionary power in general terms as to buildings and says that the exercise of that power should be consistent with the provisions of the statute, and in other sections it mentions specifically cases where that power may be exercised, does it necessarily follow that the power given by the former section is exhausted by, and the exercise of it in other cases is inconsistent with, the latter? I do not think it is. Two things are inconsistent with each other if they cannot stand together. Before, therefore, one section in an Act can be said to be inconsistent with another, they must be mutually contradictory. The Municipal Act generally gives power to a Municipality to regulate the erection of all buildings. It also says that the exercise of that power shall be consistent with the provisions of the Act. Then it goes on to provide that the Municipality may order particular things with reference to those buildings. It also gives the Municipality power to make bye-laws, not inconsistent with the Act, "relating to municipal administration." In virtue of this power to make bye-laws the Municipality makes certain rules empowering it to order other things than those specified in the Act itself. The bye-law ordering these other things can be repugnant to or inconsistent with the Act only if it alters and thereby contradicts the Act. "A bye-law is a local law, and may be supplementary to the general law; it is not bad because it deals with something that is not dealt with by the general law. But it must not alter the general law by making that lawful which the general law makes unlawful; or that unlawful which the general law makes lawful" (per Channell, J., in White v. Morley(11). Applying that principle here, the principal Act says that it shall be lawful for the Municipality to require the owner of a building to provide a privy or cesspool and sufficient drainage for it (sections 30 and 37). That is the general law; any bye-law which said that it shall be unlawful would be bad because repugnant. But the bye-law

in the present case says nothing of the kind. It relates to other things than privies, cesspools, or drainage. No doubt it relates to "buildings," and sections 36 and 37 of the Act also relate to them. But does that create any repugnancy between the twobetween the bye-law and the sections in the Act? It cannot, because the real subject-matter of the sections in the principal Act is different from the real subject-matter of the bye-lawthey do not deal with the same case. In White v. Morley (1) (which I have above cited and which was approved in Thomas v. Sutters (2) by section 23 of the Metropolitan Streets Act, 1867, it was provided that any three or more persons assembled together in any part of a street for the purpose of betting shall be deemed to be obstructing the street, and each of them shall be liable to a penalty. A bye-law made by the London County Council provided that no person should frequent and use any street or other place for the purpose of betting under a penalty. It was contended that the bye-law was repugnant to the Act, because section 23 had provided for the very thing at which the bye-law aimed, viz., betting and obstruction of the streets. Darling, J., said: "The question is whether this statutory enactment and this bye-law do deal with the same case. I do not think they do. It is true that they both deal with betting and that they both deal with obstruction of the streets. But that which is punishable under the one is not punishable under the other." So here, though the bye-law under section 33 deals with "buildings," which are dealt with also by the principal Act in certain sections, the particular things relating to buildings dealt with in the latter are different from the particular things relating to the same dealt with in the former. There can, therefore, be no inconsistency between the two, because the one does not contradict the other. We must then see whether the mention of particular things in the sections of the Act relating to buildings carried with it "the implied negative" as to other things relating to the same but not mentioned in the Act itself, on the principle of expressio unius est exclusio alterius. Before applying that

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principle we must bear in mind the observations of Lord Campbell in Bostock v. N. Staffordshire Railway Co.(1) with reference to statutes relating to a canal Company: "In construing instruments so loosely drawn as these local Acts, we can hardly apply such maxims as that "the expression of one thing is the exclusion of another" or that "the exception proves the rule." In Thames Conservators v. Smeed Dean and Co., (2) Chitty, L.J. (Lord Esher, M.R., concurring) declined to apply the rule of expressum facit cessare tacitum to the Thames Conservancy Act, because it was "not a specimen of good drafting" and "many instances occur of a departure from the cardinal rule that the same words should always be employed to mean the same thing." The Bombay Municipal Act, 1873, is not, I venture to say, a specimen of good drafting and the remarks of Chitty, L.J., apply to it in some respects. In construing the Acts relating to a Municipality we must have regard to their object and policy and construe the sections so as to effectuate the intention of the Legislature to better provide for public health and sanitation. If the language of a section of the Act may fairly apply to many different cases and only some cases are specified in other sections, it is not straining the language and meaning of the Act if bearing in mind its object we infer that the cases specified are by way of example only and not as excluding others of a similar nature.

Such a construction of the Act ought indeed not to be adopted if there is warrant for saying that the Legislature has prohibited the Municipality from doing what it has not expressly authorized. And that seems to be the principle of law on which Mr. Justice Batty's judgment proceeds. He has, among other decided cases, relied upon the authority of the decision of the House of Lords in London County Council v. Attorney-General. (3) There the London County Council bought from the London Tramways Company their tramway, &c., and worked the tramways and ran the omnibuses. The Attorney-General brought the action complaining that the Council had no power to run omnibuses and to spend the ratepayers' money for that purpose. It

^{(1) (1855) 4} E. & P. 832. (2) (1897) 2 Q. B. 334 p. 351. (3) (1902) A. C. 165.

was contended for the Council that it had the power because section 31 of the London Tramways Company Act, 1896, had authorized it to buy the tramways and "any works and property connected therewith," i.e., the omnibuses and horses, &c.; and also because section 2 of the Act impliedly authorized the Council to work the omnibus traffic. Lord Macnaghten in his judgment puts very tersely the ground upon which the decision went against the contention of the County Council. He says "The London County Council are carrying on two businesses the business of a tramway company and the business of omnibus proprietors. For the one they have the express authority of Parliament; for the other, so far as I can see, they have no authority at all. It is quite true that the two businesses can be worked conveniently together; but the one is not incidental to the other." I fail to see how a power given to a Municipality to regulate the erection of buildings stands on the same footing as a power given to it to carry on a business. A municipal body is created for the purposes of sanitation and public health; carrying on any business is not its object. Where, therefore, the Legislature empowers it to carry on a particular business, it can carry on that business only, not any other. The power to carry on business must be construed strictly and limited to what is expressly allowed. But the case stands otherwise where the interests of health and sanitation are concerned. There the power must be "benevolently" interpreted and supported if the terms in which the power is given justify either in express language or by necessary implication such interpretation. In the decision of the House of Lords just cited, the Earl of Halsbury, L.C., referred to the case of the Ashbury Railway Carriage and Iron Company v. Riche(1) and Attorney-General v. Great Eastern Railway Company 2) as laying down the law on the subject. In this latter case Lord Blackburn, speaking of the former, says: "That case appears to me to decide at all events this, that where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers

for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited; and

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consequently that the Great Eastern Company, created by Act of Parliament for the purpose of working a line of railway, is prohibited from doing anything that would not be within that purpose." The words in this citation which I have italicised are important. They show that when we have to decide whether a certain power is within the competence of a statutory body, we must look to the particular purpose for which it is created and see whether the power is impliedly given, if it is not expressly mentioned in the statute. Then Lord Blackburn goes on to say: "I quite agree with what Lord Justice James has said on this first point as to prohibition, that those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited." Lord Selborne in the same case puts it thus: "It appears to me to be important that the doctrine of ultra vires, as it was explained in that case, i.e., Ashbury Railway Carriage and Iron Company v. Riche, (1) should be maintained. But I agree with Lord Justice James that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires." Applying these principles to the present case, the Municipal Act gives the Municipality the power to regulate the erection of buildings; the main purpose, then, is their control by the Municipality. The power has, according to the Act, to be exercised in a manner not inconsistent with its provisions or in a manner not contrary to them, i.e., in the spirit of those provisions. The words used by the Legislature indicate that the power includes something which is not expressly mentioned in the provisions of the Act. Had the Legislature intended to confine the powers given to a Municipality in respect of buildings to those specifically mentioned in the Act, the language used in clauses 2 and 3 of section 33 could have been different from that actually employed by the Legislature. In that case the Legislature would have taken care to say that the Municipality shall issue

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orders "in accordance with the provisions of this Act," instead of saying that they shall not be inconsistent with or contrary to them. Impliedly, therefore, the Act authorizes the Municipality to regulate the erection of buildings beyond controlling them in the manner specially provided by sections 36, 37 and 41.

I have so far discussed the question by confining myself to the Act itself and my reading of it is that section 33 gives a general power to the Municipality to regulate the erection of buildings which is not confined to the particular provisions of the Act relating to them. As to the decided cases of this Court, to which reference is made in the differing judgments, it was conceded at the Bar before me that none of them except one exactly touched the point which has arisen in this case. therefore, propose to deal with the authorities referred to in the judgments of Batty and Aston, JJ. The one case which does touch the point but which, I understand, was not cited before Batty and Aston, JJ., is that of the Municipality of Thana v. Fazal Karim. (1) It is a direct authority in support of the construction which I think should be put upon section 33 of the Bombay Municipal Act of 1873. It was held there that a Municipality, in granting permission to a person to erect his building, could legally impose, under section 33, a condition that he should leave a gully of a certain dimension. Mr. Justice Candy in delivering the judgment in that case said: "Then Mr. Chaubal argued that there is nothing in the Act empowering a Municipality to make a passage over which the public have no right of way. But there is nothing in the Act forbidding such a thing. The intention of the Act is clearly to make the Municipality trustees for the public, especially in all sanitary matters. The Municipality by their notice of 12th May asserted that their object in requiring a gully was for the sanitary purposes of light and air; and there is nothing to contradict their allegation. If they can require all information regarding the limits, &c., of the proposed building (section 33, clause 1) there is nothing inconsistent with the Act in an order limiting the extent of the building in such a way as to provide a narrow gully."

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The result is that, in my opinion, the plaintiff has failed to show that the action of the Municipality of which he complains is illegal and *ultra vires*.

It was contended before me that, assuming the Municipality had power to issue the order complained of, the plaintiff had not acted contrary to that order, because the order was that he should build his house leaving five feet space from the wall of his eastern neighbour. Both the Courts below have held that the plaintiff has built contrary to the specific orders of the Municipality. No such contention as is now raised before me was clearly set up before them, nor can I say that the Courts below have misconstrued the order.

For these reasons, agreeing with Mr. Justice Aston in his view of the law, I confirm the decree appealed against with costs on the appellant.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1902. December 9. BALAJI RAGHUNATH PHADKE (OBIGINAL PLAINTIFF), APPELLANT,
v. RAMCHANDRA KASHI PATKAR (OBIGINAL DEFENDANT),
RESPONDENT.*

Landlord and tenant—Lease—Tenant holding over—Assent of landlord— Liability for rent after expiry of term—Transfer of Property Act (IV of 1882), section 116.

The defendant held a share of a khoti village from the plaintiff under a kabuláyat dated 30th June, 1890, for a period of five years. This suit was filed to recover from him the rent due under it for the years 1898, 1899 and 1900. He pleaded that the kabuláyat had expired on 30th June, 1895, and that subsequently to that date he held possession not of the plaintiff's share as his tenant, but of the whole village as managing Khot, and that, therefore, the plaintiff was not entitled to rent from him, but was entitled merely to his (the plaintiff's) share of the profits of the village. It appeared, however, that though the kabuláyat had expired in June, 1895, the plaintiff in 1897 had sued the

defendant for the rent due under it for the four years 1893-1894 to 1896-1897 and had obtained a decree.

Held, that the decree in that suit was an adjudication that the defendant continued in possession after the date of the expiry of the kabulayat as tenant from year to year and was liable to payment of rent for the years then sued for and that he would be liable to the rent now sued for unless he proved that after the decree in the suit of 1897 he gave such notice to the plaintiff as had in fact terminated the tenancy, and unless he put the plaintiff in the way, if he desired it, of acting on that notice by receiving from the defendant as managing Khot what the plaintiff would be entitled to receive if the tenancy by sufferance had continued.

SECOND appeal from the decision of T. Walker, District Judge of Ratnágiri, confirming the decree passed by Ráo Bahádur Mahadev Shridhar, First Class Subordinate Judge at Ratnágiri.

The plaintiff owned a one-tenth share in the khoti village of Mauje Shivrambere and leased to the defendant for a term of five years, the defendant executing a kabuláyat (rent-note) to him dated 30th June, 1890. After the expiration of the five years the defendant remained in possession, and in 1897 the plaintiff filed a suit against him and obtained a decree for rent for the years 1893, 1894, 1895, 1896 and 1897.

The plaintiff now sued him for rent for the three years 1898 to 1900.

The defendant denied his liability for rent. He contended that his tenancy had expired on the 30th June, 1895, and that he had subsequently been in possession not merely of the plaintiff's share, but of the whole village as managing Khot, and that plaintiff was now entitled not to the rent reserved by the kabulayat, but merely to his share of the profits of the village.

The Subordinate Judge dismissed the plaintiff's suit. He held that the defendant's tenancy under the terms of the kabulayat had terminated on the 30th June, 1895. In his judgment he said:

The plaintiff has produced certified copies of the decree and judgment in Suit No. 208 of 1897, which prove that plaintiff has recovered on the strength of the kabuláyat svámitva (1) for the four years 1893-1894 to 1896-1897. It is

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⁽¹⁾ That is, the share out of the products of a farm due to him, who holds directly from the State, from the person who manages it. (Molesworth and Candy's Marathi and English Dictionary, page 889.)

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This decree was confirmed on appeal by the District Judge. Plaintiff appealed to the High Court.

G. S. Rao for the appellant.

M. R. Bodas for the respondent.

CHANDAVARKAR, J .: - The plaintiff brought this suit on a kabulávat dated 30th June, 1890, to recover rent from the defendant as his tenant for the years 1897-98, 1898-99, and 1899-1900, in respect of his (the plaintiff's) one-tenth share in a khoti takshim. The kabuláyat sued on was for five years.

The defendant pleaded in answer that the period of the kabulayat having expired on the 30th of June, 1895, the relation of landlord and tenant between the plaintiff and himself ceased after that date. That would be so, no doubt, according to the decisions in Kanthenna Raddi v. Sheshanna(1) and Chandri v. Daji Bhau, (2) where it was held that where a tenancy for a fixed period expires, and the tenant continues in possession on such expiry, his possession is only by sufferance, and no relation of landlord and tenant can after that subsist in the absence of anything from which a new tenancy can be inferred.

Section 116 of the Transfer of Property Act provides that where a lessee of property remains in possession thereof after the determination of the lease granted to the lessee and the lessor or his legal representative accepts rent from the lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year,

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&c. In the present case, then, though the kabuláyat expired on the 30th of June, 1895, the relation of landlord and tenant would continue after that date if the plaintiff assented to the defendant's continuance in possession.

But it is contended for the defendant that there was no such assent and that, as a matter of fact, the defendant's possession commenced from that date in the character of managing Khot. We are asked to infer from that that the defendant's tenancy which existed in respect of the plaintiff's share in the khoti merged in or was extinguished by the defendant's possession as the managing Khot. We cannot, however, draw any such inference, having regard to certain admitted facts. Those facts are that though the kabuláyat had expired on the 30th June, 1895, the plaintiff sued the defendant in 1897 for rent under it for the years 1892-93 to 1896-97 and a decree was passed against the defendant. That was an adjudication that the defendant continued in possession after the date of the expiry of the kabuláyat as a tenant from year to year and was liable to payment. Having that decree against him, which stands unreversed, the defendant cannot in the present suit fall back on the 30th June, 1895, or any period covered by the decree and say that he is not the plaintiff's tenant, unless he shows that he determined the tonancy, after the decree, "by some intimation conveyed to the lessor and put him in the way, if he desired it, of acting on that intimation by a re-entry on the premises" (per West, J., in Venkatesh Narayen Pai v. Krishnaji Arjun(1)). Mr. Bodas has argued that the defendant's written statement in the suit of 1897 was such intimation, but it cannot be treated as such, because that would be going behind the decree in that suit. In Balaji Situram v. Bhikaji Soyare(2) a similar objection was overruled by Westropp, C.J., who held that the mere denial in a previous suit cannot operate as such notice.

The defendant, then, would be liable to pay rent to the plaintiff unless he proves that after the decree in the suit of 1897. he gave such notice to the plaintiff as would in fact terminate the tenancy and unless he put the plaintiff in the way, if he

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Neither of the Courts below has approached the case from this point of view. The lower Appellate Court has rejected the plaintiff's claim on the ground that the tenancy ceased on the expiry of the kabuláyat. That, for the reasons above set forth, is erroneous. We must, therefore, reverse the decree and remand the case for disposal with reference to the above remarks. Costs to abide the result.

Decree reversed. Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1902. December 16. BYRAMJI JAMSETJI (ORIGINAL DEFENDANT), APPELLANT, v. CHUNILAL LALCHAND AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Lis pendens—Court-sale—Auction-purchaser—Applicability of the rule of lis pendens to a purchaser at an execution sale.

The rule of lis pendens applies to purchasers at execution sales.

SECOND appeal from the decision of E. M. Pratt, District Judge of Ahmednagar, confirming the decree passed by Rao Saheb Kashidas Narayendas Dalal, Joint Subordinate Judge of Ahmednagar.

Suit by a purchaser at a Court-sale for possession of the property purchased.

The property in question originally belonged to one Sitabai. She mortgaged it to the plaintiffs on the 22nd April, 1891.

In 1897 the plaintiffs sued Sitabai on the mortgage (Suit No. 612 of 1897) and on the 31st May, 1898, obtained a decree for sale. In execution of this decree the property was sold; and the plaintiffs (the mortgages) purchased it with the leave of the Court.

Meantime, however, and while the above suit was pending, a creditor obtained a money decree against Sitabai and in

^{*} Second Appeal No. 400 of 1902.

execution attached and sold the said property on the 17th November, 1897.

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At this sale the defendant purchased and immediately afterwards took possession.

Subsequently the plaintiffs attempted to take possession, but were resisted by the defendant. They therefore applied to the Court under section 335 of the Civil Procedure Code (Act XIV of 1882), but failing in that application they filed this suit to recover possession from the defendant.

The Subordinate Judge passed a decree for the plaintiffs and ordered that the possession of the property should be given to them, holding that though the defendant had purchased at a Court-sale he was affected by the doctrine of *lis pendens*.

On appeal the District Judge confirmed this decree.

The defendant appealed to the High Court.

Ráo Bahádur Vasudev J. Kirtikar, Government Pleader, and R. W. Desai, for the appellant (defendant):—The rule of lis pendens does not apply to Court-sales: see Lalu v. Kashibai⁽¹⁾; Kasumunnissa v. Nitratna.⁽²⁾ In Dinendronath v. Ramkumar⁽³⁾ the Privy Council makes a distinction between a private sale and a Court-sale. The rulings, therefore, relating to private sales cannot be applied to Court-sales. See also Lakshmandas v. Dasrat.⁽⁴⁾

Branson (with him B. A. Bhagvat) for the respondents (plaintiffs):—An auction-purchaser at a Court-sale is affected by the doctrine of lis pendens: see Dinonath v. Shama Bibi(5); Sukhdeo Prasad v. Jamna(6); Shivjirom v. Waman.(7)

Aston, J.:—The plaint house belonged to one Sitabai, who mortgaged it to respondents in April, 1891. The respondents on 31st May, 1898, obtained, in Suit No. 612 of 1897, a decree against their mortgager Sitabai for sale of the mortgaged house, and at the Court-sale held in execution of the said decree they

^{(1) (1886) 10} Bom. 400.

^{(4) (1880) 6} Bom. 168 at p. 173.

^{(2) (1881) 8} Cal. 79.

^{(5) (1900) 28} Cal. 23.

^{(3) (1881) 7} Cal. 107.

^{(6) (1900) 23} All, 60.

^{(7) (1897) 22} Bom, 939.

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purchased the right, title and interest of Sitabai in the said house.

Meanwhile during the pendency of the respondent's mortgage suit No. 612 of 1897 against Sitabai, the appellant had, at a Court-sale held in execution of a money decree obtained by a creditor against Sitabai, purchased the right, title and interest of Sitabai in the said house as existing at the date of the attachment of the said house in the creditor's suit in which the money decree was passed.

There is no express finding by the lower Courts whether this attachment in the money suit was placed soon after, or just before, the institution of the mortgage suit No. 612, but it is not in dispute that the attachment was long after the house had been mortgaged by Sitabai to the respondents.

The respondents and the appellant are thus rival purchasers at different Court-sales of Sitabai's equity of redemption, and this suit No. 714 of 1900 was brought by respondents after an unsuccessful obstruction, removed in Miscellaneous Application No. 99 of 1900, to recover possession of the plaint house from the appellant who had obtained possession.

The Court of first instance, applying the doctrine of *lis pendens* to the rival Court-sales, decided that the title of the respondents is superior to that of the appellant and awarded the respondents' claim for possession. The lower Appellate Court confirmed this decree.

At the hearing of this second appeal it was argued for the appellant, first, that the doctrine of *lis pendens* does not apply to a Court-sale; secondly, that the question whether the plaint house was attached in the money suit before mortgage suit No. 612 of 1897 was instituted is material and should have been decided; thirdly, that the question whether the mortgage by Sitabai to the respondents was without consideration and, therefore, the mortgage decree collusive and fraudulent, is material in the present suit and should have been decided.

Taking these points in order:

In the well-known case of Bellamy v. Sabine (1) Lord Cranworth said: "Where a litigation is pending between a plaintiff and a

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defendant as to the right of a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end. A mortgage or sale made before final decree to a person who had no notice of the pending proceedings would always render a new suit necessary, and so interminable litigation might be the consequence."

The doctrine of *lis pendens* is discussed in the Bombay cases of *Balaji* v. *Khushalji* (1) and *Gulabchand* v. *Dhondi*, (2) where it is applied to private sales.

In Ravji Narayan v. Krishnaji, (3) where there were rival purchasers at different Court-sales, the doctrine of lis pendens was held clearly applicable. In the latter case Westropp, C.J., said: "But further, if there had not been any decree in the mortgage suit, the mere fact that that suit, which had been instituted in 1860, was pending in 1868, would have in itself been sufficient to defeat the plaintiff's present suit. His purchase in 1863" (at a Court-sale in execution of a money decree) "having been made pendente lite was completely subject to any decree which might be made in the mortgage suit."

In a later Bombay case, Parvati v. Kisansing, (4) the dispute was between a Court-purchaser Kisansing who, in the execution of a money decree against one Ramapa, had bought a house as the property of Ramapa, and on the other side a decree-holder Parvati who had obtained a decree against Ramapa declaring her right to reside in the house. There had been an attachment placed in the money suit prior to Parvati's suit, but the Court-sale under the money decree was during the pendency of Parvati's suit to declare her right to possession. It was held that what Kisansing bought at the Court-sale under the money decree was the right, title and interest of Ramapa, which being

^{(1) (1874) 11} Bom. H. C. R. 24.

^{(2) (1873) 11} Bom. H. C. R. 64,

^{(3) (1874) 11} Bom. H. C. R. 139. (4) (1882) 6 Bom. 567.

BYRAMJI CHUNILAL. subject to the decree in Parvati's pending suit, the purchase by Kisansing at the Court-sale was likewise subject to the same, and the circumstance that a prior attachment had been placed on the house made no difference. Therefore, Kisansing could not eject Parvati during her lifetime.

The last two cases were not followed in Lalu v. Kashibai,(1) where in the judgment delivered by Birdwood, J., a distinction is sought to be drawn between private sales and Court-sales. The differences therein dwelt upon do not appear to touch the true foundation of the rule of lis pendens as laid down in the leading case of Bellamy v. Sabine(2) or the reasoning contained in the passages quoted therefrom and adopted by Westropp, C.J., in Balaji v. Khushalji.() It is not necessary to pursue this point further, because whatever doubts may have been cast by the judgment of Birdwood and Jardine, JJ., upon the correctness of the view taken in the earlier decisions in Ravji Narayan v. Krishnaji(4) and Parvati v. Kisansing(5) already cited, that the rule of lis pendens applies to Court-sales, are fully removed by the decisions of the Privy Council in Radhamadhub Holdar v. Monohur Mukerji(6) and Moti Lal v. Karrabuldin,(7) as well as by the provisions of section 52 of the Transfer of Property Act (IV of 1882), so that it may now be taken as settled law that the rule of lis pendens is applicable to Court-sales.

The second contention for the appellant, that his title would be superior to that of the respondents if the plaint house was attached in the money suit against Sitabai prior to the suit or decree on the mortgage (No. 612 of 1897), is disposed of by the remark of their Lordships of the Privy Council in Moti Lal v. Karrabuldin (3): "attachment, however, only prevents alienations; it does not confer title."

The respondent's right as a mortgagee existed before the attachment. "It was, therefore, unaffected by it": see Parvati v. Kisansing. (9) It may here be pointed out that Anundo v.

^{(1) (1886) 10} Bom. 400.

^{(5) (1882) 6} Bom. 567.

^{(2) (1857) 1} De Gex. & J. 566,

^{(6) (1888)} L. R. 15 I. A. 97; 15 Cal. 756,

^{(3. (1874) 11} Bom. H. C. R. 24. (4) (1874) 11 Bom. H. C. R. 139.

^{(7) (1897) 25} Cal. 179. (9) Ibid p. 185.

^{(9) (1882) 6} Bom. at p. 570.

Dhonendro, (1) which was a case of a purchase under an attachment upon a decree, has no application to this case, for there the attachment under which the sale took place was anterior to the mortgage upon which the mortgage suit was founded.

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There remains, lastly, the contention that appellant should have been allowed to prove that the mortgage on which the decree was passed against Sitabai in the lis pendens (No. 612 of 1897) was without consideration. This was a plea which, if true in fact, Sitabai could have and ought (see section 13, Civil Procedure Code) to have set up in the lis pendens as a ground of defence. The appellant claims through Sitabai and is bound by the decree passed in the mortgage suit No. 612 of 1897 (the lis pendens) against her: see the decisions of the Privy Council in Radhamadhub v. Monohur (2) and Moti Lal v. Karrabuldin (3) already cited, and appellant bought the plaint house subject to such decree as might be passed in the lis pendens. The contention now set up is, therefore, barred as res judicata (see section 13, Civil Procedure Code, and Chenvirappa v. Puttappa (4)) and it is not open to the appellant to raise it in this suit.

For the above reasons the decree of the lower Appellate Court is confirmed with costs on the appellant.

Decree confirmed.

(1) (1871) 14 M. I. A. 101.

(3) (1897) 25 Cal. 179.

(2) (1888) L. R. 15 I. A. 97.

(4) (1887) 11 Bom. 708.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

BALA (ORIGINAL PLAINTIFF), APPELLANT, v. SHIVA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

December 19.

1902.

Mortgage—Suit for redemption—Burden of proof on plaintiff—Evidence
—Proof of specific mortgage.

The plaintiff sued for redemption and to recover possession of certain lands, alleging that they had been mortgaged to the ancestors of the defendants about

BALA v. SHIVA. forty-five years before suit. The defendants, who were in possession, denied the mortgage. The Subordinate Judge found the mortgage proved and passed a decree for redemption. On appeal the Judge reversed the decree and dismissed the suit. He was of opinion that the plaintiff was bound to prove a specific mortgage made forty-five years ago as alleged in the plaint and that he had failed to do so. On second appeal,

Held (remanding the appeal), that the real question was whether the defendants were mortgagees of the property in question. The plaintiff did not tie himself down to a specific mortgage made at a particular time. He was entitled to succeed if he proved that the land was held by the defendants as mortgagees.

SECOND appeal from the decision of Ráo Bahádur Mahadev Shridhar Kulkarni, First Class Subordinate Judge of Ratnágiri, reversing the decree of Ráo Sáheb K. D. Bodas, Subordinate Judge of Chiplun.

Suit for redemption. On the 26th May, 1897, Govind Narayan Surve and Sadashiv Narayan Surve sold the land in suit to the plaintiff subject to a mortgage which their grandfather Rama had executed to one Govind Lakshman.

In 1898 the plaintiff filed this suit to redeem the said mortgage. In his plaint he stated that the land had been mortgaged about forty-five years before suit, that he did not know the exact date of it or the terms of the mortgage, and that the defendants and their predecessors in title had admitted the mortgage from time to time.

The defendants were the descendants of Govind Lakshman (original mortgagee) and of his brothers.

Defendant 1 (son of Govind) and defendants 2 and 3 (grandsons of Govind) and defendants 5 and 6 (sons of Govind's brother) did not appear.

Defendant 4 (brother of Govind) and defendants 7, 8 and 9 (sons of a brother of Govind) denied the mortgage and alleged that they were and always had been in possession. They denied that they had ever admitted the alleged mortgage or that they were bound by any acknowledgment made by the other defendants.

Defendant 12 alleged that defendant 1 (Govind's son) and Govind had mortgaged a part of the land to him with possession on the 25th January, 1888.

None of the other defendants appeared.

The Court of first instance found that Rama had mortgaged the land to Govind Lakshman about forty-five years before suit for Rs. 100 and held that the plaintiff was entitled to redeem and to recover possession from the defendants on payment of Rs. 100 to them.

On appeal this decree was reversed and the plaintiff's suit was dismissed. The Judge was of opinion that the alleged mortgage was not proved. In his judgment he said:

The plaintiff alleges that the lands in dispute were mortgaged by Rama bin Mahadu to Govind Lakshman, and he must prove his allegation. The only direct evidence on the point is that of witness No. 34 I cannot bring myself to act on the uncorroborated testimony of this single and solitary witness and hold it proved that a mortgage of the lands in dispute was executed by Rama Surve to Govind Lakshman Bhosle about fifty years ago.

Plaintiff's witness No. 57 says that at the time of the surveys, when the lands were being measured, Govind Lakshman told the karkun Rambhau that the lands belonged to Rama Mahadu and were held by him in mortgage and should be entered in Rama's name Such evidence cannot be believed.

Defendant No. 11, as plaintiff's witness No. 54, has produced Exhibit 56, a mortgage-deed, executed to him by Govind bin Lakshman on Shake 1801, Paush Vadya 13th (8th February, 1880). The land comprised in this mortgage is Survey No. 128, Pot No. 4, in suit, and is described as 'आहाकडे राम विन माहादू सुर्वे याचा भारा महाम चालत आहे त्यांतील' (out of the dhara of Rama bin Mahadu Surve held by us in mortgage). In 1895, defendant No. 1 made a similar statement in reference to Survey No. 139, Pot No. 5. I think that these statements were made by defendant 1 and his father with the object of describing the lands rather than as specification of title.

I agree with the learned Subordinate Judge's remarks about the difficulties in the plaintiff's way, but I do not think that absolves the plaintiff from the duty of making out a prima facie case by sufficient and satisfactory evidence. There must be some evidence, however slight, which can be relied on as satisfactorily proving that the lands sought to be redeemed were mortgaged by Rama bin Mahadu Surve to Govind Lakshman Bhosle about forty-five years ago for Rs. 100. The Subordinate Judge has held that the lands were mortgaged in 1846. The plaintiff in 1898 alleged that they were mortgaged forty-five years ago, i.e., in 1853. The plaintiff's witness No. 34, whose evidence is the only evidence on the point, said in 1900 that the lands were mortgaged about fifty years ago, that is, in 1850. I cannot believe the evidence of witnesses Nos. 34 and 57. The so-called admissions of defendant No. 1 and his father furnish no evidence of the mortgage of the lands within sixty years (vide Chotiram Lalchand v. Bhau bin Ramji, Bom. Law Reporter, Vol. I, page 2). There is nothing to show that the defendants are wilfully keeping the evidence of the mortgage and there is no reason to discredit them when they say they do not know and have no muniments of title in their possession or power.

BALA V. SHIVA. The plaintiff appealed to the High Court.

D. A. Khare for the appellant (plaintiff).

S. R. Bakhale for the respondents (defendants).

CHANDAVARKAR, J.:—The plaintiff, Bala bin Pandu Devkar, brought this suit to redeem the lands in dispute, alleging that their owner, Rama Mahadu Surve, had mortgaged them to Govind Lakshman Bhosle, father of defendant No. 1 and grandfather of defendants 2 and 3, about forty-five years ago, for Rs. 100; that the period fixed for redemption was ten years; and that the mortgagor Rama's heirs had sold the equity of redemption to the plaintiff.

There were twelve defendants brought on the record. Of them defendants 4, 7, 8 and 9 contended that the property had come into the possession of their ancestor Dhonda Balkoji for Rs. 500 in A.D. 1788 and that since then their family had been in possession. They denied the mortgage sued upon and pleaded limitation. Defendant No. 12 claimed two of the lands in suit under a mortgage from defendant No. 1 and his father. The other defendants raised no defence.

Defendants Nos. 1 to 10 and defendant No. 13 are descended from one ancestor. The Subordinate Judge, following the principle laid down in Balaji v. Babu, (1) Ramchandra v. Balaji, (2) and Parmanand v. Sahib Ali, (3) held the mortgage alleged by the plaintiff proved. He based his finding, firstly, on an admission made by Govind, father of defendant No. 1, contained in Exhibit 56, that the dhara of Rama bin Mahadu Surve was in the possession of his family, under a mortgage; secondly, on an admission of defendant No. 1 in Exhibit 30 that one of the lands in suit was in his possession under a mortgage; thirdly, on oral testimony; and, fourthly, on the fact that the lands still stood in the revenue records in the name of Rama Mahadu Surve's heir. Accordingly, the Subordinate Judge passed the usual decree for redemption. In appeal, the First Class Subordinate Judge, A. P., has reversed that decree, holding that the mortgage sued on is not proved.

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It is quite clear from the appellate judgment that the Subordinate Judge, A. P., was of opinion that the plaintiff must fail unless he proves that the mortgage transaction was entered into in 1853, because in the plaint it was stated that the lands had been mortgaged forty-five years ago. Criticising the judgment of the Subordinate Judge in the Court of first instance, the Subordinate Judge, A. P., says, referring to the admission of a mortgage made in Exhibit 56 by Govind, father of defendant No. 1, and that made by defendant No. 1 in Exhibit 30, that these admissions "undoubtedly do not refer to the mortgage on the basis of which the plaintiff's suit is founded and are no evidence of any particular mortgage." Then the Subordinate Judge, A. P., says at the end of his judgment: "The Subordinate Judge has held that the lands were mortgaged in 1846. The plaintiff in 1898 alleged that they were mortgaged forty-five years ago, i.e., in 1853. The plaintiff's witness No. 34, whose evidence is the only evidence on the point, said in 1900 that the lands were mortgaged about fifty years ago, i.e., in 1850." In the plaint the mortgage set up was stated to have been made about forty-five years ago; and it is taking too literal and technical a view of the plaint to take it to mean that the mortgage transaction was entered into in 1853 and that unless that was proved the plaintiff must fail. The plaintiff has been careful to state the date of the mortgage approximately, and it was open to him on the pleadings to show that the lands were mortgaged, if not in 1853, at any rate at some time about that period. On this point we would draw the attention of the Court below to the observation of this Court in Lakshman v. Hari Dinkar.(1)

It is true that when a plaintiff sues to redeem, and the defendant denies the mortgage, the plaintiff must in the first instance "prove" his title. "A plaintiff, who alleges that his ancestor forty-four years ago made a mortgage to the ancestor of the present possessor of a property and by virtue thereof seeks to dispossess the present possessor must prove his case clearly and indefeasibly": Sevvaji Vijaya Raghunadha Valoji Kristnan Gopalar v. Chinna Nayana Chetti. In the present case the Subordinate Judge, A. P., was right in throwing the onus on

BALA v. SHIVA. the plaintiff of proving his case, and of requiring him to "make out a prima facie case by sufficient and satisfactory evidence." But in dealing with the evidence the Subordinate Judge, A. P., as pointed out above, acted under the erroneous impression that what the plaintiff had to prove was some specific mortgage alleged to have been made in 1853. No doubt the plaintiff has stated in the plaint that the lands were mortgaged about forty-five years ago, but the real question between the parties is sufficiently apparent on the record, and that is whether the defendants are mortgagees. The plaintiff did not tie himself down to any specific mortgage made in that year and no other, and would be entitled to succeed if he proves that the lands were still held by the defendants as mortgagees.

Then we come to the evidence adduced by the plaintiff. The Subordinate Judge, A. P., has declined to accept the oral evidence, and, under ordinary circumstances, his appreciation of it would be binding upon this Court in second appeal. But where such appreciation is influenced by an erroneous view of the plaintiff's cause of action as stated in the plaint, it is open to this Court in second appeal to interfere. Assuming that the oral testimony of the witnesses of the plaintiff is fairly open to the unfavourable comments to which the Subordinate Judge, A. P., has subjected it, we have in this case certain admissions by defendant No. 1's father and by defendant No. 1 himself contained in Exhibit 56 and in Exhibit 30 respectively. Exhibit 56 is a mortgage of one of the lands in dispute in 1880 by defendant No. I's father to defendant No. 11. There defendant No. 1's father speaks of that land as one of the dhara lands of Rama bin Mahadu Surve held by his (defendant 1's father's) family in mortgage. Similarly, defendant No. 1 made an admission in Exhibit 30 as to Survey No. 139, Pot No. 6. The factum of these admissions is admitted, nor is it disputed that all the lands in dispute are known as the dhara of Rama bin Mahadu Surve. They have stood as such in the revenue records in the name of Rama and his heir. The Subordinate Judge, A. P., does not hold that the admissions were not made; nor does he reject them on the ground that as they were made by defendant No. 1's father and defendant No. 1 respectively they cannot have any probative force against

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the other defendants. The ground on which he declines to draw a presumption from them in favour of the plaintiff's case is that "these statements were made by defendant No. 1 and his father with the object of describing the lands rather than as specification So far as this remark of the Subordinate Judge. A. P., applied to Exhibit 56, it is not borne out by the wording of the document itself. The words used there are that the dhara of Rama bin Mahadu Surve "continued with us in mortgage"expressions which can bear no other construction than that the dhara was held at the date of Exhibit 56 in mortgage by the family of defendant No. I's father. In other words, the father of defendant No. 1 speaks of the title of his family to the dhara as one not only originally founded upon but still continuing on a mortgage to the family. There is no warrant, therefore, for the remark of the Subordinate Judge, A. P., that the admission was more a description of the property than a specification of title. It is true that in Exhibit 56 defendant No. 1's father also speaks of the land mortgaged thereby to defendant No. 11 as his property. But that recital is not necessarily inconsistent with the recital as to the property continuing with him as a mortgagee. The second ground assigned by the Subordinate Judge. A. P., for rejecting the admissions in Exhibits 56 and 30 is that they "do not refer to the mortgage on the basis of which the plaintiff's suit is founded and are no evidence of any particular mortgage." They may be no evidence of any particular mortgage, but they are certainly evidence so far that the defendants came into possession as mortgagees, and as such they have a bearing on the main question at issue in the case—whether the defendants are mortgagees or owners of the property? The Subordinate Judge, A. P., seems to have been under the impression that nothing short of proof that the lands were mortgaged in 1853 could be treated as evidence in law in favour of the plaintiff's As already pointed out above, that way of treating the plaintiff's claim is opposed to the ruling of this Court in Lakshman v. Hari Dinkar, (1) which is followed in Raghunath Annaji v. Babaji bin Rama.(2)

The proper and legal mode of dealing with a case of this kind

BALA v. SHEVA. has been pointed out in a number of decisions of this Court beginning with Balaji Narji v. Babu Devli.(1) There it was said by this Court: "It being the ordinary custom in this part of India that deeds creating mortgages should remain in the custody of the mortgagee alone, no counterpart being taken by the mortgagor, very slight primû facie proof that a mortgage had been originally made would serve to shift the entire burden of proof on the defendant in cases of this character; but this primâ facie proof must be forthcoming, and in its absence a plaintiff seeking redemption cannot be relieved of the burden which is imposed on all plaintiffs of establishing the fact or facts out of which their claim to relief arises." This does not mean that the moment the plaintiff adduces any slight evidence, the burden is shifted. As with all evidence, the Court must appreciate it, and the burden is shifted only when the Court regards the evidence as trustworthy where it is a question of its trustworthiness. Where, as in the present case, there are admissions of a mortgage, the Court ought to deal with them as evidence, for admissions are only evidence and not conclusive proof, and if it finds that the admissions are trustworthy and may be legally used against all the defendants, then the burden would be shifted. That is the principle on which the decision in Balaji v. Babu(1) was followed in Vishram v. Devkaran(2) and Rama v. Baburao. (3) If the lower Appellate Court find that the defendants' ancestors came into possession as mortgagees and that the plaintiff's allegation as to a mortgage is proved, it will be for the defendants to meet that case. On this point we would draw the attention of the lower Court to Rajah Kishen v. Narendar and Parmanand v. Sahib Ali.(5)

We must, for these reasons, reverse the decree and remand the appeal for a fresh hearing. At such fresh hearing the lower Appellate Court should dispose of the case on all the issues, including the issue as to the alleged mortgage which the plaintiff seeks to redeem. In this judgment we have dealt only with the mode in which the Subordinate Judge, A. P., should consider

^{(1) (1868) 5} Bom, H. C. Rep. (A. C. J.) 159.

^{(3) (1874)} P. J. 19.

^{(2) (1886)} P. J. 248.

^{(4) (1875) 3} I. A. 85.

the case, and in reversing his decree and remanding we do not by any means express any opinion on the evidence which it is for the lower Appellate, and not for this, Court to appreciate. Costs to abide the result. 1902.

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Decree reversed. Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar, Mr. Justice Batty and Mr. Justice Aston.

SAKHARAM SHANKAR AND OTHERS (PLAINTIFFS) v. RAMCHANDRA BABU MOHIRE (DEFENDANT).*

1902. December 22.

Stamp—Bill of Exchange—Sufficiency of stamp—Construction of instrument.

In determining the question whether a particular instrument is sufficiently stamped, the Court should only look at the instrument as it stands.

Ramen Chetty v. Mahomed Ghouse(1) and Royal Bank of Scotland v. Tottenham,(2) followed.

REFERENCE made by R. M. Kennedy, Commissioner, Southern Division, under section 57 of the Indian Stamp Act (II of 1899).

At the hearing of a suit in the Court of the Joint Subordinate Judge at Vengurla, a document was put in evidence, dated 26th October, 1896, purporting to be a hundi for Rs. 1,000 payable at sight and stamped with a one-anna stamp. In the course of the evidence in the case it appeared that there was a practice in the district for borrowers of money to give the lenders a document in this form in order to evade higher stamp duty. In giving judgment the Subordinate Judge said:

The evidence and argument in this case has shown that there is a practice in this táluka of giving hundis payable on demand when one man borrows, that these hundis are not presented for payment, and that the drawer himself repays the amount. It is the very essence of a bill of exchange that not the drawer but some other person on his behalf pays the money and that it should also be presented for payment as soon as possible. If all these implied and oral conditions will be mentioned in a bill of exchange, then it will not be considered a bill of

SAKHARAM v. RAM-CHANDRA. exchange but a bond, or at least a bill of exchange not payable on demand, which requires a higher stamp duty than one required for a bill of exchange payable on demand. The hundi sued upon in this case is of a similar nature and first I thought it should be considered not duly stamped. But after consideration of the matter I have come to the conclusion that I cannot consider the document first as it stands not duly stamped. I think when deciding whether a particular document is duly stamped I cannot go outside the document and import conditions therein which are brought forth in evidence during the case. I think I should only read the document and decide only from the contents what stamp it should bear. I, however, think that the parties to such transactions are guilty under the Stamp Act, sections 27, 64 (a) and (e) or 68 (e). I believe the matter is of importance as there is a regular practice in this taluka of passing such hundis payable on demand when in reality they are not hundis payable on demand but instruments of another kind.

The Subordinate Judge submitted the matter to the Revenue Commissioner, S. D., who referred the case to the High Court under section 57 of the Indian Stamp Act (II of 1899).

The reference was heard by a Bench composed of Chandavarkar, Batty and Aston, JJ.

The Government Pleader for the Government:—For the purposes of the Stamp Act (II of 1899) it is permissible only to look at the instrument itself: it is not permissible to import any extraneous evidence to interpret an instrument: see Ramen Ohetty v. Mahomed Ghouse⁽¹⁾ and Chandra Kant Mookerjee v. Kartik Charan Chaile.⁽²⁾

There was no appearance on behalf of either party to the suit.

CHANDAVARKAR, J.:—In our view of the law the Subordinate Judge was right in looking at the document as it stands in determining the question whether it is sufficiently stamped and in treating it as properly stamped as a bill of exchange: see Ramen Chetty v. Mahomed Ghouse(1); Royal Bank of Scotland v. Tottenham. (3) A defect, if any, in the Stamp Act cannot be cured by construing a document to be other than what it is or purports to be.

(1) (1889) 16 Cal. 432. (2) (1870) 5 Ben. L. R. 103; 14 Cal. W. R. 38 (O. C.) (3) (1894) 2 Q. B. 715. The Revenue Commissioner should be informed that in making a reference to this Court under the Stamp Act the original document should be sent with the reference. In this case the original document has not been sent and we have had to look at a certified copy.

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Order accordingly.

TESTAMENTARY JURISDICTION.

Before Mr. Justice Russell.

JEHANGIR RUSTOMJI DIVECHA (APPLICANT) v. BAI KUKIBAI
AND OTHERS (OPPONENTS).

1903. January 15.

Executor-Will-Probate-Probate granted to some of the executors— Executors who have not proved may call for inventory and account from executors who have proved and are managing the estate.

One Ardeshir R. Divecha, a Parsi inhabitant of Bombay, died in 1900. By his will he appointed his wife, his eldest son and two other persons, of whom the applicant was one, to be his executors, his wife and eldest son being named as managing executors. In 1901 the two latter applied for probate. The other two executors, though called on to join in the application, did not do so. The Court granted probate to the wife and the son, and reserved leave to the other executors to apply. No application was, however, made by them. In 1902 the applicant called upon the managing executors for an inventory and account of the deceased's estate. The applicant had no beneficial interest in the estate. It was contended for the managing executors that the applicant had no right to require an inventory and account from them.

Held, that the applicant was entitled to an inventory and account. The facts that under section 179 of the Indian Succession Act (X of 1865) the property of the deceased vested in the applicant as executor of the will, and that he might at any time apply for probate, gave him an interest sufficient to justify his application.

CITATION issued at the instance of Jehangir Rustomji Divecha, calling upon the opponents, two of the executors of the will of one Ardeshir Rustomji Divecha, to appear before the Judge in Chambers within eight days after service and "then and there to exhibit on oath a true and perfect inventory and a just account of the property and credits of the said Ardeshir Rustomji

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Divecha, late of Bombay, Parsi, deceased, and file the same at the procuration of Jehangir Rustomji Divecha or otherwise show cause to the contrary, &c., &c.''

The deceased Ardeshir Rustomji Divecha died in July, 1900, leaving his widow Bai Kukibai (the opponent), five sons and five daughters.

By his will he appointed as his executors his widow Bai Kukibai, his eldest son Jijibhoy, his brother Jehangir Rustomji Divecha (the applicant) and his cousin Sorabji Dadabhoy Divecha, and he appointed the said Bai Kukibai and his said eldest son Jijibhoy to be managing executors "to carry on the management appertaining to his house."

In January, 1901, Bai Kukibai and Jehangir applied for probate and before doing so they wrote to Jehangir Rustomji (the applicant) and Sorabji Dadabhoy (the other executor named in the will) inquiring whether they wished to join in the said application. Not receiving any reply they got probate issued to themselves on the 15th February, 1901, in the usual form, leave being reserved to Jehangir and Sorabji to come in and apply. At the date of this citation neither of them had made any application.

By his said will the testator disposed of his whole property for the benefit of his widow (Bai Kukibai) and his sons and daughters. The applicant Jehangir Rustomji was given no beneficial interest whatever in the estate.

After obtaining probate Bai Kukibai and Jijibhoy proceeded to administer the estate. They did not, however, file any inventory or account.

On the 9th December, 1902, the applicant Jehangir called upon Bai Kukibai and Jijibhoy to file an inventory and account and required them to give him inspection of the books and papers relating to the estate of the deceased. They denied that he had any right to inspection or to require an inventory, &c.

He thereupon on the 22nd December, 1902, issued the above citation.

Lowndes for the opponents showed cause:—The applicant has no interest in the estate and has not obtained probate. He has therefore no right to require us to file an inventory or to get

inspection. The only persons interested under the will support us and do not want any inventory or account to be filed: Coote's Probate Practice (11th Edition), page 251; Williams on Executors, Vol. I, pages 841-844; Paul v. Nettlefold(1); Huggins v. Alexander(3); Indian Succession Act (X of 1865), section 277; Henderson's Succession Act.

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Inverarity contra: - The property of the testator has vested in my client as one of the executors named in the will: section 4 of the Probate and Administration Act (V of 1881); section 179 of the Succession Act. How can it be said he has no interest in it?

RUSSELL, J.: -On the 22nd December, 1902, the citation herein was issued. (His Lordship read the citation as above and continued:)

The applicant is one of the executors named in the will of the deceased. Leave has been reserved to him to apply for probate.

The point of law raised by Mr. Lowndes is a novel one as far as I have been able to discover, his argument being that the applicant has not an interest sufficient to support his citation. This involves the question as to what is the position of an executor in India.

By section 3 of the Indian Succession Act (X of 1865) "executor" is defined as a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided. Section 179 of that Act, which agrees with the fourth section of the Probate and Administration Act (V of 1881) provides that "the executor of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such." Section 179 applies to Parsis: see Parsi Succession Act (XXI of 1865), section 8. The effect of section 179 is to put the law in India on the same footing as that in England: see Williams on Executors (7th Edition), page 629, and cf. Jaykali v. Shibnath (3) and Kherodemoney v. Doorgamoney. (4) Probate is made operative as the authenticated evidence, and not at all as the foundation, of the executor's title, for he derives all interest from the will

^{(1) (1824) 2} Adams 237.

^{(3) (1866) 2} Beng. L. R. 1 (O.C.)

^{(2) (1735-6)} Ibid in Notes p. 238. (4) (1879) 4 Cal, 455 at p. 468. в 1632-1

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itself and the property of the deceased vests in him from the moment of the testator's death. In England any person having an interest or appearance of an interest may call on the executor to exhibit an inventory and account, and a probable or contingent interest is enough: see *Phillips* v. *Bignell(1)*; *Myddleton* v. *Rushout(2)*; *Rymes* v. *Clarkson.(3)* It seems to me that if the property vests in the executor he has an appearance of an interest at all events. And inasmuch as he may at any time apply for probate, he has a contingent interest sufficient to entitle him to call upon his co-executors to account. I therefore must decide this point in favour of the applicant.

Citation made absolute.

Attorneys for applicant—Messrs. Payne, Gilbert, Sayani and Moos.

Attorneys for opponents-Messrs. Sorabji and Jehangir.

(1) (1811) 1 Phil, 239 p. 241. (2) (1797) *Ibid* 244. (3) (1809) *Ibid* 22 at p. 37.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1903. January 9. CHINTAMAN NILKANT AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, v. GANGABAI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.**

Practice—Procedure—Civil Procedure Code (Act XIV of 1882), sections 362, 544 and 583—Appeal—Death of joint appellant pending appeal—Legal representatives of deceased appellant not brought on the record—Appeal proceeded with by surviving appellant—Power of Court to hear the appeal and reverse whole decree.

In a suit for partition, the lower Court passed a decree for the plaintiffs. Two of the defendants, who denied the plaintiffs' right and claimed the property as their own, filed a joint appeal. Pending the appeal one of them died, and her representatives were not brought on the record. The surviving appellant, however, proceeded with the appeal and, at the hearing, the decree of the lower Court was reversed and the plaintiffs' suit dismissed. The plaintiffs filed a second appeal to the High Court and contended that the lower Appellate Court ought not to have heard the appeal inasmuch as it had abated, or at all events that that Court had no power to reverse the lower Court's decree so far as it related to the deceased appellant.

^{*} Second Appeal No. 596 of 1900.

Held, that, as the two defendants had appealed on grounds common to them both, the lower Appellate Court had power to hear the appeal and to deal with the whole suit under section 544 of the Civil Procedure Code (Act XIV of 1882).

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SECOND appeal from the decision of Ráo Bahádur Mahadev Shridhar, First Class Subordinate Judge of Ratnágiri with Appellate Powers, reversing the decree of Ráo Sáheb K. H. Kirkire, Second Class Subordinate Judge of Vengurla.

Suit for partition. The plaintiffs sued for a fourth share of the property in question. Of the defendants (of whom there were fourteen in all), some admitted the plaintiffs' claim and demanded their own share in the property; others were merely tenants and did not appear. Two of the defendants, however, viz. Gangabai and Anpurnabai (defendants 10 and 11), denied the plaintiffs' right to partition and claimed the property as their own, alleging that it had belonged to their father Pandurang, and on his death had come to them as his heirs.

The Subordinate Judge found in favour of the plaintiffs and awarded partition of the property among them and certain of the defendants.

Gangabai and Anpurnabai (defendants 10 and 11) appealed. Pending the appeal Gangabai (defendant 10) died. Her legal representatives were not placed on the record, but the appeal proceeded at the instance of Anpurnabai only. On hearing the appeal the Judge reversed the decree of the lower Court and dismissed the suit.

The plaintiffs preferred a second appeal to the High Court and contended that under sections 362 and 582 of the Civil Procedure Code (Act XIV of 1882) the appeal by the defendants to the lower Court had abated inasmuch as the representatives of Gangabai had not been made parties, and that; at all events, under the circumstances the lower Court should not have reversed the whole decree, but only so much of it as related to Anpurnabai's share.

Pending the hearing of the second appeal Anpurnabai (defendant 11) also died and the appellants (plaintiffs) placed her representatives on the record as respondents.

Vinayak M. Mone for the appellants (plaintiffs):—He relied on sections 362 and 582 of the Civil Procedure Code (Act XIV of 1882) and cited Chandarsang v. Khimabhai. (1)

CHINTAMAN v. GANGABAI. Chintamani A. Rele for the respondents (representatives of defendants 10 and 11):—Gangabai and Anpurnabai filed a joint appeal against the decree of the lower Court. The facts that Gangabai died pending that appeal and that her representatives were not placed on the record in her place did not prevent Anpurnabai from proceeding with the appeal. The case of both of them was the same. They claimed the whole property and the decree dealt with that claim. Under section 544 of the Civil Procedure Code (Act XIV of 1882) the Judge in appeal had power to reverse the whole decree and did so: Chandarsang v. Khimabhai⁽¹⁾; Puran Mal v. Krant Singh.⁽²⁾

CHANDAVARKAR, J.:—The first point urged in this appeal is that Gangabai having died and no legal representative of hers having been brought on record the appeal abated, and that, therefore, the Appellate Court had no jurisdiction to deal with the decree passed against Gangabai.

No doubt under sections 362 and 582, Civil Procedure Code, the appeal abated so far as Gangabai was concerned, but under section 544, Civil Procedure Code, Anpurnabai had a right to appeal independently of the provisions of sections 362 and 582 of the Civil Procedure Code, if her defence was common to her and Gangabai, and the mere fact of her having been joined with Gangabai would not take away her right to appeal. It was held in Chandarsang v. Khimabhai() that "the decree having been passed against the defendants, it was open to any one of them to appeal against it if the ground of appeal was common to all defendants, and it was open to the lower Appellate Court to deal with the appeal under section 544."

No doubt in the lower Appellate Court the appeal that was heard was the appeal of Anpurnabai, but in dealing with that appeal it was open to the lower Appellate Court to hear and deal with the whole suit if the defence was common.

The second point urged is as to the appreciation of evidence. The finding of the lower Appellate Court on this point is binding on us. Decree confirmed with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

BALAJI NARAYAN GOKHALE (ORIGINAL PLAINTIFF), APPELLANT, v. NANA BIN BABAJI GHATGE and others (ORIGINAL DEFENDANTS), RESPONDENTS.*

1903. January 13.

Hindu Law-Joint Hindu family—Manager—Arbitration—Power of manager to refer a dispute to arbitration—Award—Minors bound by the award.

A manager of a joint Hindu family, even when he is not the father, has the power to bind the family by a reference of a dispute with any outsider regarding any family property to arbitration, provided such reference be for the benefit of the family. Minors in the family are bound by the reference and consequently by the award made upon it.

SECOND appeal from the decision of G. C. Whitworth, District Judge of Sátára, reversing the decree passed by Ráo Sáheb N. V. Samant, Subordinate Judge at Rahimatpur.

Suit to recover possession of certain land.

The land in question belonged originally to one Babaji Ghatge, who mortgaged it with possession to the plaintiff. Shortly afterwards the plaintiff leased it to Babaji under a written kabulayat (lease) dated the 10th November, 1883.

Babaji died about the end of 1889 leaving behind him four sons: (1) Nana, (2) Ganu, (3) Narahari, and (4) Dayanu (defendants 1—4). Of these Narahari and Dayanu were minors at Babaji's death and at the date of the suit.

On the 28th March, 1890, a decree in terms of an award was made between the plaintiff and the heirs of Babaji, by which the heirs of Babaji were ordered to pay to the plaintiff Rs. 19,731-15-0 and interest and costs on the 28th April, 1890, and to redeem the property: in default they were to stand foreclosed. To this decree the sanction of the Court under section 462 of the Civil Procedure Code (Act XIV of 1882) was not obtained.

Default was made. The plaintiff thereupon claimed to be owner of the property.

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In 1897 plaintiff brought this suit against the heirs of Babaji to recover possession of the land. It was contended (inter alia) that the award was not binding on the minor defendants. Defendants 1 and 2 further contended that the decree was collusive.

Defendant 4 (Dayanu) had been given in adoption in another family in 1892 and had ceased to be interested in the matter.

The Subordinate Judge found that the decree was binding except as against Narahari (defendant 3) who was a minor; and (without further regarding Dayanu (defendant 4) as he had passed out of the family) declared the plaintiff to be the owner of two-thirds of the property.

On appeal, the District Judge held that Narahari was not bound by the decree; that the adoption of Dayanu (defendant 4) having taken place in 1892, that is, after the date of the decree, plaintiff was not entitled to his share; that the decree was not collusive; that the compromise was grossly negligent of the minor's interests; that Dayanu's share would pass to the coparceners and not to the plaintiff; and that joint possession could not be decreed to the plaintiff. He therefore reversed the decree passed by the Subordinate Judge and dismissed the plaintiff's suit.

Plaintiff thereupon preferred a second appeal.

N. M. Samarth for the appellant (plaintiff):—The Courts below have based their decision on the ground that no sanction was granted by the Court under section 462 of the Civil Procedure Code (Act XIV of 1882) when the decree was passed in terms of the award. This, we contend, is wrong. Section 462 of the Civil Procedure Code (Act XIV of 1882) applies to awards made in the course of a suit; it does not apply to an arbitration not arising out of a pending suit: Vithaldas v. Dattaram. (1) In the present case there being already a decree the defendants ought to have filed a suit to set it aside within the period allowed by law. As defendants they cannot be allowed by law to take up a position which would not now be open to them as plaintiffs. Both the Courts below have found as a fact that there was neither fraud nor collusion as to the reference to arbitration, or

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as to the award, or as to the final decree in terms of the award. That being so, it is not right in law to disregard the final decree merely because some terms of it are not so favourable as they might have been. It has been found that all the defendants were properly represented. Respondent 3 was not really a minor: the lower Court is wrong in thinking he was a minor. Even assuming that he was, the decree is good as against him. His adult brothers as managers of the family had authority to bind the whole family by a bond fide reference to arbitration. The reference, the award and the decree were all beyond suspicion and for the benefit of the whole family, including the minor members, if any. Mahadev v. Krishnabai (1) is not strictly applicable to the facts of this case. The view of the law laid down therein is impliedly dissented from in Vithaldas v. Dattaram. (2) In any case we are entitled to possession, our mortgage being a mortgage with possession and our present suit being within twelve years from the date of the mortgage.

K. H. Kelkar for respondent 3:—It is found that respondent 3 was a minor when the decree was passed. Admittedly no sanction was given under section 462 of the Civil Procedure Code (Act XIV of 1882). Under these circumstances sanction cannot be implied from the mere fact that a decree has been passed: Virupakshappa v. Shidappa. (3) The procedure prescribed for passing decrees on awards resembles the procedure to be followed in passing decrees in suits: and even in the latter case the sanction of the Court is essential under section 462 of the Civil Procedure Code (Act XIV of 1882): Mahadev v. Krishnabai. (1)

Even assuming that the Code of Civil Procedure (Act XIV of 1882) does not apply, the Court is bound to see that the interests of the minors are safeguarded: In the matter of Romon Kissen Sett v. Hurrololl Sett. (4) The sole test in such cases is, was the compromise for the benefit of the minor? If not, the Court cannot uphold it: Lalla Bunseedhur v. Koonwar Bindeseree Dutt Singh. (5) The minor defendant having been in possession of his share all along, the decree was nothing more than a brutum

^{(1) (1896)} P. J. p. 609.

^{(3) (1901) 26} Bom 109.

^{(2) (1901) 26} Bom. 298.

^{(4) (1892) 19} Cal. 334.

^{(5) (1866) 10} M. I. A. 454_o

Balaji v. Nana. fulmen, so far as he was concerned. He was not bound to get it set aside: Orr v. Sundra Pandia. (1)

B. A. Bhagwat for the remaining respondents.

CHANDAVARKAR, J.: - The principal ground on which the decision n this second appeal turns, and on which the District Judge has rejected the claim of the plaintiff for possession, is that the decree for foreclosure obtained by the plaintiff in March, 1890, in terms of an award is not binding on defendant 3 (Narahari) and defendant 4 (Dayanu) who were minors at the date of the award. It is found that the family to which these two defendants belonged consisted of themselves and their brothers, Ganu and Nana (defendant 1), when the reference to arbitration was made, and that Ganu and Nana were the adult members of the family at the time. It is not contended, nor has the District Judge found, that in an undivided Hindu family consisting partly of minors, the manager of it has no right to refer any matters in dispute to arbitration even though such reference be for the benefit of the family. In Jagan Nath v. Mannu Lal, (2) Edge, C.J., held that as a father in a joint Hindu family as manager fully represents the family, and, in the absence of fraud or collusion, his acts are binding on the other members of the family, it is competent for him to refer any dispute with reference to any matter, in which the family is interested, to arbitration. We are of opinion that the same principle would hold good in the case of a manager of a joint family where such manager is not the father, and he would have power to bind the family by a reference of its dispute with any outsider regarding any family property to arbitration, provided such reference be for the benefit of the family. Any minors in the family would be bound by the reference and consequently by the award made upon it. The District Judge has not in the present case impugned the award on the ground of any want of power in the adult members, who were managers of the defendant's family, to refer the dispute with the plaintiff to arbitration. What the District Judge holds is that the award is bad and not binding upon the defendants who were minors at its date, because some of its terms are not beneficial to those defendants.

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the award of an arbitrator is the decision of a quasi-judicial tribunal and cannot be questioned as invalid merely on the ground that its terms are not favourable to one of the parties to it. What the District Judge really means, perhaps, is that before passing a decree in its terms the Court in which the award was filed ought to have considered the question whether it was for the benefit of the minor defendant as required by section 462 of the Mr. Kelkar for defendant No. 3 has taken Civil Procedure Code. up that position here and relied upon the decision of Parsons and Ranade, JJ., in Mahadev Balkrishna Kelkar v. Krishnabai. (1) That decision was cited in Vithaldas Ganpat v. Dattaram Ramchandra, (2) in which the learned Chief Justice and Chandavarkar, J., held that section 462 "obviously contemplates the existence of a guardian and a pending litigation"; and has, therefore, no application to an award filed in Court for having a decree passed in its terms. As to the decree passed in this case in terms of the award, it is found by the Courts below that there was neither fraud nor collusion as to it, as there was none as to the reference and the award themselves. Before the decree was passed, a guardian ad litem had been appointed to represent the defendants who were minors, as required by the Code of Civil Procedure. The minor defendants were, therefore, properly represented, and the Court accordingly passed the decree. It is not suggested that the decree was not in accordance with the provisions of the Code of Civil Procedure relating to arbitration. If the reference to arbitration was proper in the sense that it was for the benefit of the minors, the Court was bound to pass a decree in terms of the award passed on that reference, if there was none of the objections to the award pointed out in the chapter on arbitration in the Civil Procedure Code. There was no duty imposed on the Court at that stage of considering whether the terms of the award were for the benefit of the minors. The imposition of such a duty on a Court where the reference itself is not impugned as fraudulent or unauthorized would practically mean either that, where there are minors in a Hindu joint family, its manager has no power in any case to refer any dispute to arbitration, or that,

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though he can refer, the award would be nugatory if any of its terms are unfavourable to the minors. There is no law which lays down that as the principle governing in such cases or which contemplates such a result. As held by the Privy Council in Ghulom Khan v. Muhammad Hassan, "the principle of finality which finds expression in the Code is quite in accordance with the tendency of modern decisions in this country. The time has long gone by since the Courts of this country showed any disposition to sit as a Court of Appeal on awards in respect of matters of fact or in respect of matters of law: see Adams v. Great North of Scotland Railway Company." (2)

For these reasons we reverse the District Judge's decree and award the claim with costs throughout on the respondents.

Decree reversed.

(1) (1902) 29 I. A. 58; 29 Cal. 167.

(2) (1891) A. C. 31.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1903, January 15. SITARAM APAJI KODE (ORIGINAL DEFENDANT NO. 1), PLAINTIFF, v. SHRIDHAR ANANT PRABHU AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS NOS. 2 AND 3), RESPONDENTS.*

Mortgage—Discharge of mortgage—Death of mortgagee—Heirs of mortgagee—

Payment of mort gage debt to one of the heirs.

Where property is mortgaged to a person who subsequently dies leaving two or more heirs jointly entitled to his estate, payment made by the mortgager of the amount due on the mortgage to one of those heirs, without the concurrence of the rest, does not amount to a valid discharge to the mortgagor.

SECOND appeal from the decision of T. Walker, District Judge of Ratnágiri, reversing the decree passed by Ráo Sáheb N. B. Mujumdar, Subordinate Judge of Devgad.

One Vasudev Balkrishna (ancestor of plaintiffs) owned one-sixth share in the khoti villages of Bharni and Chafet. This share he mortgaged with possession to Apashet in 1880 for Rs. 799

^{*} Second Appeal No. 318 of 1902.

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Apashet died on the 20th June, 1809, leaving an eldest son (defendant 1) by a first wife and two other sons (defendants 2 and 3) by a second wife. During Apashet's life the first defendant lived separate from him and his brothers (defendants 2 and 3), and after Apashet's death he continued to live separate from defendants 2 and 3.

On the 2nd August, 1899, plaintiffs paid Rs. 799 to defendant 2, and received from him the mortgage deed and a deed of release.

Subsequently when the plaintiff attempted to collect rent from the tenants of the property, they were obstructed by defendant 1.

The plaintiffs, therefore, filed this suit against the defendants to obtain a declaration that they were entitled to manage their one-sixth share of the khoti villages Bharni and Chafet, and to recover the rents of that share from the tenants.

Defendant 1 contended (inter alia) that plaintiffs had not redeemed the mortgage and were not entitled to the relief claimed.

The Subordinate Judge found that payment to defendant 2 was not proved; that it was not effective against defendant 1: and he dismissed plaintiff's suit.

On appeal, however, the District Judge held that the payment by plaintiffs to defendant 2 was proved, and that it was effective against defendant 1. He passed a decree for the plaintiffs. In his judgment he said:

The question that remains is one of law,—whether this payment to defendant 2 is a valid discharge of the mortgage. The law point seems to be the same as in I. L. R. 20 Madras, 461, viz., that there has been a valid discharge; and the question of fact I have decided on consideration of the depositions of Balkrishna (who has made a statement which can afterwards be used against him), of Exhibit 27, and the fact that the mortgage deed was returned to plaintiff by defendant 2 who had been living with Apa. Defendant 1 as the eldest son claims to have been the manager and, therefore, the only person to whom the mortgage money ought to have been paid. It seems certain that since Apa's death defendant 1 was not the defacto manager of the whole property of the family; the two families were living apart and were mutually hostile, though no partition of property was made, each having possession of some portion of the whole.

Defendant 1 appealed to the High Court.

- D. A. Khare for the appellant (defendant 1).
- H. C. Coyaji for respondents 1 to 7.
- M. N. Mehta for respondents 8 and 9.

SITARAM v. SERIDHAR, The following cases were referred to in the course of the arguments: Barber Maran v. Ramana Goundan 1); Ahinsa Bibi v. Abdul Kader Saheb. (2)

CHANDAVARKAR, J.:—The principal question of law argued in this second appeal is whether, where property is mortgaged to one person and that person subsequently dies, leaving two or more heirs jointly entitled to his estate, payment made by the mortgager of the amount due on the mortgage to one of those heirs, without the concurrence of the rest, amounts to a valid discharge to the mortgagor. The District Judge has held that it does, relying on the authority of the ruling of the High Court of Madras in Barber Maran v. Ramana Goundan. (1) That decision is based upon the English case of Wallace v. Kelsall, (3) and the last paragraph of section 38 of the Indian Contract Act, which provides that "an offer to one of several joint promisees has the same legal consequences as an offer to all of them."

So far as this Madras decision proceeds upon the English law, its correctness may well be doubted, having regard to the decision of Farwell, J., in Powell v. Brodhurst. (1) It is not, however, necessary for us to express any opinion on the correctness of the decision in Barber Maran v. Ramana Goundan(1) and the construction put there upon the last paragraph of section 38 of the Indian Contract Act. In that case the payment was made to one of several joint mortgagees, and it may well be that in such a case where a mortgagor has mortgaged his property to several mortgagees holding jointly, and promised to pay his debt to them before redeeming, an offer of payment to one of the promisees has, under the last paragraph of section 33 of the Indian Contract Act, the same legal consequences as an offer of payment to all of them. But where, as in the present case, the mortgage was made not to several persons jointly but to one person, there was only one promisee, and the case cannot fall within the meaning of the last clause of section 38 unless the several heirs of the promisee, who, on his death, inherit his estate, are to be regarded as joint promisees. There is nothing either in section 38 or in the definition of "promisee" in the Indian Contract Act to show that they must

^{(1) (1897) 20} Mad. 461.

^{(2) (1901) 25} Mad. 26.

^{(3) (1840) 7} M. & W. 264.

^{(1) (1901) 2} Ch. 160.

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be so regarded. The right which the several heirs jointly get on the mortgagee's death to enforce the mortgage is a right created by law in consequence of the devolution upon them of the single and indivisible right which the mortgagee had as the sole promisee, and not in consequence of their being "joint promisees." In the words of Tindal, C.J., in *Decharms* v. *Horwood*, '1' several co-heirs constitute one heir and are connected together by unity of interest and unity of title. One of the heirs, therefore, cannot enforce the mortgage without the concurrence of the rest so as to give a valid discharge to the mortgagor and free the mortgaged property from the incumbrance.

It is to be remarked that the same view is taken of the law in Ahinsa Bibi v. Abdul Kader Saheb.(2) In that decision Bhashyam Ayyangar, J., after doubting whether the case of Barber Maran v. Ramana Goundan(3) was rightly decided, goes on to say: "It may be that when money is advanced to one by several persons jointly, each of them authorises the others, by implication, to act on his behalf, and a release or discharge, therefore, of the claim, by one, is binding upon the others. Assuming that the principle of the English Common Law as to the operation of a release given by one of two or more joint promisees is not affected by the Indian Contract Act, and is the law here, as held in Barber Maran v. Ramana Goundan (3) already cited, it is clearly inapplicable to the case of co-heirs, who are not joint promisees, but the heirs of a single promisee, and it will be dangerous to extend and apply the English doctrine to a release given by one of such co-heirs......In the case of co-heirs, among Hindus, the Hindu Law, as a general rule, constitutes one of them, the senior in age, as the karta or manager of the inheritance on behalf of all the co-heirs."

In the present case, the mortgage was made to Apashet, father of defendants 1 to 3. It is found by the District Judge that since his death the three defendants have not been living together, but that defendants 2 and 3 with their families have been living apart from defendant 1. Assuming that they constitute a joint Hindu family, the plea of the plaintiff 1 that he

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paid the amount due on the mortgage to defendant 2 as manager of the family is negatived by the District Judge's finding that "the two families"—of defendant 1 on the one hand and of defendants 2 and 3 on the other—"were living apart and were mutually hostile." According to Hindu Law, defendant 1, as the eldest of the three brothers, was entitled to the management of the family; but even as to him, having regard to the above-mentioned finding of the District Judge, it is clear that he could not act on behalf of all the brothers. Much less could defendant 2 represent his brothers and bind them by any transaction which had not their concurrence. We must, therefore, hold that the payment by the plaintiffs did not discharge the mortgage.

It was upon the basis of a discharge of the mortgage that the plaintiffs brought this suit for a declaration that they were entitled to have their names entered in the khoti registers as managers of the property in dispute, and as that basis fails, strictly speaking, the plaintiffs are not entitled to the decree passed by the District Judge. But as all the parties interested in the mortgage are before us, it is not desirable to expose them to fresh litigation if complete relief can be given now without prejudice to the rights of any and without altering the nature of the suit. It has been found that defendant 2 has received the whole of the mortgage debt, Rs. 799, from the plaintiffs. The allegation that the payment was fraudulent is negatived by the finding of the District Judge. The specific fraud alleged by the defendant 1 was that it was a bogus payment, and it is not open to defendant I to plead fraud of any other kind. The only defence which remains to defendant 1 is that he has not received his proportionate share. As to the last argument of the appellant, the plaintiffs' suit is to have a declaration entitling them to have their names entered in the khoti register, and they are clearly entitled to it, having regard to the admitted fact that most of the lands in dispute are in the possession of tenants.

The decree will be: On payment by plaintiffs to defendant 1 of one-third of Rs. 799 within two months from this date, the decree of the District Judge should stand confirmed, each party hearing his own costs of this appeal. Otherwise in default of such payment within the period of two months, the decree of the District Judge to stand reversed and that of the Subordinate Judge restored with costs in this and the lower Appellate Court on the plaintiffs (appellants).

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APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

KANHAYALAL BHIKARAM AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v. NARHAR LAXMANSHET VANI (ORIGINAL DEFENDANT NO. 2), RESPONDENT.*

1903. January 23.

Mortgage—Redemption—Clog on the equity of redemption—Agreement of sale of the mortgaged property subsequently to mortgage.

It is open to a mortgager and mortgagee to enter into a contract subsequently to the mortgage for the sale of the mortgaged property to the mortgagee. But it must not be part and parcel of the original loan or mortgage bargain.

Ramji v. Chinto (1 Bom. H. C. R. 199) followed and applied.

SECOND appeal from the decision of Dayaram Gidumal, District Judge of Khándesh, reversing the decree passed by E. F. Rego, Subordinate Judge at Erandol.

Suit for redemption. In 1848 the plaintiff's grandfather Hirachand mortgaged the house in question for Rs. 818 with possession to Ramchandra, ancestor of defendants 1—4. The deed of mortgage was dated the 8th April, 1848, and the mortgage-debt was made repayable on the 8th October, 1848. The deed contained a gahan lahan clause, which provided that if the mortgager did not redeem within the time fixed he should for ever be foreclosed. On the 11th October, 1849, the mortgagee had the mortgage deed registered; and on the 13th March, 1856, he had it again registered apparently on account of some defect in the first registration.

The mortgage-debt was not paid within the stipulated period. About a year after the time fixed for repayment the mortgagor Hirachand being pressed for payment of the mortgage-debt sold the equity of redemption to Ramchandra (the mortgagee). No

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On the death of Ramchandra (the mortgagee) his property was divided among his heirs, and the house in question fell to the share of defendant 2.

The plaintiffs denied the sale to Ramchandra. On the 7th January, 1898, they gave notice to defendants of their intention to redeem. To this notice the defendants gave no reply.

On the 24th August, 1899, the plaintiffs filed this suit to redeem

Defendant 2 contended that the plaintiffs had no right to redeem inasmuch as the house had been sold to Ramchandra.

The Subordinate Judge held that the sale by Hirachand to Ramchandra was not proved and passed a decree for redemption ordering that "plaintiffs pay Rs. 878 to defendant 2 within six months from this date and redeem the property in suit."

On appeal the District Judge reversed the decree, and holding that the house had been sold by the mortgagor to Ramchandra dismissed plaintiffs' suit. His reasons were as follows:

I hold on the above facts that the mortgagor being unaware of his legal rights believed that he was bound by a gahan lahan clause; that the mortgagee also believed that under that clause he could foreclose and become absolute owner, and that the mortgagor and the mortgagee being both unaware of the principle adopted afterwards in Ramji v. Chinto ((1864) 1 Bom. H. C. Rep. 199) proceeded to settle the transaction; that the mortgagor did pay Rs. 10 or 12 for repairs and wind up the account by selling the house for the mortgage-debt.

In the present case in consequence of his ignorance of the law he (mortgagor) believed that the mortgagee had it in his power to foreclose. But I go further and say that there was a fresh transaction also. It is probable that the mortgagor had obtained time after his default, but when that time expired he told the mortgagee in effect: "I am not able to pay up and so I sell you the land and I am going to pay you what you have spent on the repairs."

According to the Printed Judgments of 1897, page 75, we have to see whether there is any evidence of a fresh transaction. Had the mortgagee foreclosed at once on the date of the default in the absence of the mortgagor it might have been said he had acted purely on the gahan lahan clause, but the evidence shows that a year elapsed thereafter and that there was a distinct sale by the mortgagor. I hold, therefore, that I. L. R. 14 Bom. 78 does not apply to this case and there is evidence of a fresh transaction within the meaning of the Printed Judgments of 1897, page 75.

The plaintiffs appealed to the High Court.

Ramji v. Chinto(1) and Abdul Rahim v. Madhavrav.(2)

S. R. Bakhale for appellants (plaintiffs):—The lower Appellate Court has wrongly held that there was a fresh transaction of sale. Even after the alleged sale transaction, the mortgagee or his representatives got the original mortgage-deed registered on two occasions. The entries made in his own books by the mortgagee that the property had been sold to him by the mortgagor are no evidence against us. The so-called fresh transaction took place under a wrong impression of both parties as to the legal effect of the gahan lahun clause. The original mortgage, therefore, is still in existence and is redeemable:

N. M. Samarth for respondent (defendant 2):-The lower Appellate Court has found on the oral and documentary evidence in the case that there was a distinct and independent transaction of sale about a year after the gahan lahan clause had come into operation. The sale was no doubt consequent on the gahan lahan clause, but it was independent of it. An account was made up of the mortgage. The repairs effected by the mortgagee were valued, and as the mortgagor was to pay the mortgagee the costs thereof, the amount was added to the mortgage-debt. The valuation of the property was made and it was found that the debt and the costs of the repairs exceeded the estimated value of the property by Rs. 10 or 12. The mortgagor paid to the mortgagee the amount found due, viz. Rs. 10 or 12, to complete the transaction of sale, and the parties thenceforward treated the property as having been sold. The evidence of those who were present at the transaction and the entries made in the mortgagee's account books at the time justify the lower Appellate Court's finding that there was a distinct fresh transaction of sale. This is a finding of fact arrived at after a careful consideration of the evidence in the case and this Court cannot disturb it in second appeal. Where there is such a fresh transaction of sale the equity of redemption is lost: Janardhan v. Gonind.(3) The ignorance of the parties

1903, Kanhayalal v. Narhar.

^{(1) (1884) 1} Bom. H. C. Rep. 199. (2) (1889) 14 Bom. 78. (3) (1897) P. J. p. 75.

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as to the legal effect of the gahan lahan clause is immaterial: Vishnu v. Kashinath. (1)

CHANDAVARKAR, J.:—The law is well established that, though once a mortgage always a mortgage and no clog can be placed by the mortgagee on the mortgagor's equity of redemption, it is open to both of them to enter into a contract subsequent to the mortgage for the sale of the mortgaged property to the mortgagee. That principle was enunciated by the Court of Appeal in England in the case of Lisle v. Reeve, (2) where Vaughan Williams, L.J., said: "I did not understand the defendant's counsel to dispute that it is competent for a mortgagee to enter into an agreement to purchase from the mortgagor his equity of redemption. The only objection to such an agreement is, that it must not be part and parcel of the original loan or mortgage bargain. The mortgagee cannot, at the moment when he is lending his money and taking his security, enter into an agreement, the effect of which would be that the mortgagor should have no equity of redemption. But there is nothing to prevent that being done by an agreement which in substance and in fact is subsequent and independent of the original bargain." The decision of the Court of Appeal in Lisle v. Reeve (2) has been affirmed by the House of Lords.(3) That being the law, and it being in accordance with the Full Bench case of Ramii v. Chinto(4) and the other decisions of this Court following it, it is not clear from the judgment of the District Judge in the case before us whether he had the law fully in his mind in holding that the plaintiffs had lost their right to redeem in consequence of a fresh transaction between them and the defendant. The facts found by the District Judge are shortly these. The mortgager mortgaged the property with possession and the deed contained the usual gahan lahan clause. The mortgagor failed to pay within the stipulated period, and about a year after his failure the parties made up an account of the mortgage and it was agreed that the mortgagor should sell the property to the mortgagee. The mortgagor paid Rs. 10 or 12

^{(1) (1886) 11} Bom. 174.

^{(2) (1902) 1} Ch. 53.

^{(3) (1902)} A. C. 461,

^{(4) (1864) 1} Bom. H. C. 199,

to the mortgagee for costs of repairs and the mortgagee continued in possession as owner. They acted upon that understanding for several years. It is this "fresh transaction" which, according to the District Judge, extinguished the mortgage and passed the property to the mortgagee as purchaser. But though this was a fresh transaction the question still remains, was it independent of the mortgage? Though it is not clear whether the District Judge had fully in mind the legal principle to which we have referred at the outset, yet he has found very distinctly that the mortgagor entered into the fresh transaction under the belief that he was bound by the gahan lahan clause; and that the mortgagee entered into it because he also believed that he could become absolute owner under it. The necessary inference from that finding is that the agreement for the sale of the property to the mortgagee which the District Judge calls "a fresh transaction" was not a bargain independent of the mortgage, but was based upon the gahan lahan clause in the mortgage-deed. It was virtually a transaction enforcing that clause, and, therefore, it falls within the principle laid down by this Court in the leading case of Ramji v. Chinto. (1) It cannot be contended in such a case that the principle of either estoppel or acquiescence concludes the mortgagor and bars his right to redeem. He is not estopped because he did not by any declaration, act or omission cause or permit the mortgagee to believe that the mortgage had become extinguished. The mortgagee was as much responsible for the belief as the mortgagor. The parties did, indeed, act for several years upon the understanding that the mortgage had been converted into a sale, but, as held in Abdul Rahim v. Madhavrav, (2) that is not sufficient to extinguish the mortgagor's equity of redemption where the understanding and the conduct of the parties was solely due to their belief as to the gahan lahan clause and was not the consequence of any transaction independent of the mortgage. We must, therefore, reverse the decree and remand the appeal to the District Judge for passing a proper redemption decree including costs.

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KANHAYALAL v. NARHAR.

Decree reversed. Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Batty and Mr. Justice Starling.

1903. January 22. MAHOMED ISUB AND ANOTHER (ORIGINAL DEFENDANTS 2 AND 3), APPELLANTS, v. BASHOTAPPA BIN TAKAPPA (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), section 331—Specific Relief Act (1 of 1877), section 9—Suit for possession—Execution of decree—Obstruction—Application for removal of obstruction registered as a suit—Questions arising in such suit.

In the case of a claim numbered and registered under section 331 of the Civil Procedure Code (Act XIV of 1882) as a suit between a decree-holder and an obstructing claimant, the only issues arising are whether the person obstructing was in possession of the property in question on his own account or on account of some person other than the judgment-debtor (i. e., the defendant in the original suit). No question requiring the decree to be re-opened can be raised.

SECOND appeal from the decision of R. Knight, District Judge of Dhárwár, amending the decree of Ráo Sáheb H. V. Chinmulgund, Subordinate Judge of Gadag.

Suit for possession of certain land.

The land belonged originally to one Imam, who had four sons, viz., Mahomed Amin, Mahomed Isub, Mahomed Yasin and Ahmad Saheb (defendant). In 1894 Mahomed Amin leased the land to plaintiff, Bashotappa, for ten years. After the plaintiff had taken possession, Mahomed Isub and Mahomed Yasin ejected him, whereupon in 1896 the plaintiff sued them (Suit No. 677 of 1896) under section 9 of the Specific Relief Act (I of 1877) to recover possession, and obtained a decree against them. Ahmad Saheb obstructed the plaintiff in executing this decree, claiming to be entitled to the property. Ahmad Saheb's claim was thereupon, under section 331 of the Civil Procedure Code (Act XIV of 1882), registered as a suit by the plaintiff against Ahmad Saheb as defendant.

The defendant alleged inter alia that he and his three brothers lived as a united family and that as manager he was in possession of the land, which belonged jointly to him and his brothers; that Mahomed Amin had no authority to lease it to the plaintiff; and

^{*} Second Appeal No. 425 of 1902.

that the decree obtained by the plaintiff in Suit No. 677 of 1896 against Mahomed Isub and Mahomed Yasin did not bind him, as he was not a party to the suit.

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The Subordinate Judge found that the land was the joint property of the four brothers, and that Mahomed Amin (the plaintiff's lessor) had no authority to lease more than his share to the plaintiff. He therefore passed a decree giving the plaintiff joint possession with Ahmad Saheb, Mahomed Isub and Mahomed Yasin. In his judgment he said:

It therefore follows that Mahomed Amin and the defendant and their two brothers being all entitled to the property, and it not having been proved that Mahomed Amin was entitled to lease the property of the other co-owners and the said co-owners having now disputed Mahomed Amin's authority to lease the land and plaintiff's right to recover exclusive possession, the plaintiff is not entitled to anything more than getting joint possession with defendant and his brothers. The plaintiff is therefore entitled to step into Mahomed Amin's shoes and get joint possession along with his brothers. The defendant's pleader does not object to this course. I therefore find that plaintiff is entitled to get joint possession of the property in suit along with defendant and his brothers.

The plaintiff has obtained a decree in the former suit maintaining his possession and in execution of that decree he is entitled to get joint possession, and as the decree is being executed within three years from its date, I find that the claim is in time.

I therefore order that plaintiff do recover possession of the land in suit along with defendant and his brothers so far as the right, title and interest of Mahomed Amin are concerned, and I order that defendant should not cause obstruction to the delivery of this joint possession. Under the circumstances of the case I order each party to bear his own costs.

In appeal the question was raised as to whether Mahomed Amin had not derived the property from his uncle Mahomed Husen, and was not therefore the exclusive owner. The Judge accordingly remanded the case to the lower Court for inquiry as to whether the property had belonged to Mahomed Husen, and, if so, whether Mahomed Amin was his sole heir. In his remanding judgment he said:

As a preliminary remark, I am certainly disposed to accede to appellant's contention that assuming each brother to own a quarter interest in the land, plaintiff is, by virtue of his lease from one brother and of his successful suit against two others, entitled to at least three-fourths of the whole land. Isub and Yasin have taken no steps to question the summary decree under section 9 of the Specific Relief Act (I of 1877), and it is good as against them; and Amin does not repudiate the lease.

MAHOMED ISUB v. BASHOTAPPA. The case that defendant sets up is that the land, whatever its original character, has become the joint family property of himself and his brothers.

I do not at the present stage discuss the evidence already adduced, for it is clear that the real question at issue lies rather between Amin and his brothers than between the present plaintiff and one brother. That question is whether the property was in the sole ownership of Mahomed Husen or whether it is the family property in which his brother's sons are entitled to share. To a suit of this character it is highly desirable that all the brothers should be parties; and I therefore direct that Mahomed Amin, Mahomed Isub and Mahomed Yasin be joined to the suit, the first-named as a plaintiff, if he wishes it, the others as defendants. It is needless to observe that the two latter will not be absolved hereby from the consequences of their failure to question the summary decree.

The lower Court, on remand, found both the above points in the negative. The Judge, in accordance with the opinion above stated in his judgment, varied the decree by awarding to the plaintiff joint possession with Ahmad Saheb only. In his judgment he said:

From what has already been said, however, it is clear that the plaintiff is entitled to joint possession with Ahmad only and not with all the brothers. The other three have already ceded their claims to him for the currency of his lease. I amend the decree of the lower Court accordingly.

Under the circumstances, I think it fair to direct that plaintiff, who has failed in his main contention regarding Amin's sole ownership, do bear his own appellate costs and two-thirds of respondent's.

Mahomed Isub and Mahomed Yasin (defendants 2 and 3) preferred a second appeal.

Shivram V. Bhandarkar for the appellants (defendants 2 and 3):—
The Judge having found that each of the brothers had a fourth share in the property, he ought to have awarded us joint possession with Ahmad Saheb (defendant 1) and the plaintiff, who of course is entitled to Malfomed Amin's share under his lease. We have always had possession and it was not necessary for us to bring a suit to get rid of the effect of the decree in the summary suit. It has been so ruled in similar cases under the Mamlatdars' Act (Bombay Act III of 1876): Nemava v. Devandrappa(1); Ramchandra v. Rarji. (2) There is no limitation provided in the Limitation Act for a suit to set aside a decree in a summary suit except perhaps the ordinary provision of twelve years. That provision for the recovery of possession

cannot apply, and no cause of action accrues unless the party against whom the decree in the summary suit is passed loses his possession. Now that we have been brought on the record, and if it be necessary, the case may be remanded to determine the question of title: Mowlakhan v. Gorikhan. (1)

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Narayan M. Samarth for the respondent (plaintiff): - We obtained a decree under section 9 of the Specific Relief Act (I of 1877) against the present appellants (defendants 2 and 3). This is a proceeding in execution of that decree. They cannot be allowed to question in execution our right to be restored to possession. The original defendant, Ahmad Saheb, can keep us out of possession only in so far as his one-fourth share is concerned. The title of our judgment-debtors cannot be gone into in the present case. The Judge should not have made them parties at all even with the reservation he made in doing so. Our lessor (Mahomed Amin) does not and cannot object, and the present appellants cannot obstruct us. We are entitled to execute our decree and obtain possession of the land except in so far as Ahmad Saheb's one-fourth share is concerned. We are also entitled to our costs of this second appeal from the present appellants.

Batty, J.:—In this case the plaintiff having in a previous suit obtained a decree against two brothers, now appellants, for possession under section 9 of the Specific Relief Act, was resisted by a third brother, Ahmad Saheb, the original defendant in the present suit, and in accordance with section 331 of the Code of Civil Procedure (Act XIV of 1882) the claim was numbered and registered as a suit between the decree-holder as plaintiff and the obstructing claimant as defendant. The issues that properly arose in such a suit under the provisions of that section were whether the person obstructing was in possession on his own account or on account of some person other than the judgment-debtor; and no question of title between the plaintiff and his judgment-debtors requiring the decree against them to be re-opened could possibly be adjudicated upon in such a proceeding. The joinder of the judgment-debtors was admittedly an irregularity. But the lower

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Appellate Court abstained, or apparently intended to abstain, from consummating that irregularity by deciding on the title as between the decree-holder and the judgment-debtor.

We have been asked to remand the case in order that that question of title might now be investigated, and referred to the case of Moulakhan v. Gorikhan⁽¹⁾ beginning at page 627. But that was a case between a decree-holder and a person resisting execution claiming under a title adverse to the judgment-debtors; and obviously the question of title, as between those parties, necessarily required decision in that case. We think it is equally obvious that the question of title between the judgment-debtors and the decree-holder cannot be gone into in this case arising in execution of the decree, as it would enable the judgment-debtors to re-open in execution a decree purporting to be in force against them, and this was certainly never contemplated in section 331 or any other provisions of the Code, and would frustrate the provisions of section 9 of the Specific Relief Act.

We think, however, that the District Judge's judgment is so far open to objection as it seems to suggest that the question of the title between the plaintiff and the present appellants, his judgment-debtors, was susceptible of discussion in this case, and ought to be decided against the judgment-debtors on the strength of the decree for bare possession. All passages in that judgment which could bear the construction that they decided on the question of title between the plaintiff and the judgment-debtors must be regarded as obiter dicta, as no issue on that point could arise in this case.

We therefore think that the form of the decree should be that the plaintiff is entitled to execute his decree as against the claimant Ahmad Saheb (defendant 1), except in so far as concerns the one-fourth share which has been declared to be the property of Ahmad Saheb. Appellants to bear costs of this appeal. The order as to costs in the Court below remains undisturbed.

Decree varied.

Note. —Ahmad Saheb was found entitled to one-fourth of the land. His share was unaffected either by the lease granted by Mahomed Amin or by the decree obtained in the possessory suit against Mahomed Isub and Mahomed Yasin. The plaintiff, therefore, was awarded possession of three-fourths jointly with him.

(1) (1890) 14 Bom. 627.

ORIGINAL CIVIL.

Before Mr. Justice Batty and Mr. Justice Starling.

GELL, APPELLANT, v. TAJA NOORA (ORIGINAL PETITIONER), RESPONDENT.* 1903. February 2.

License—License of public conveyances—Power of Commissioner of Police to grant licenses—Discretion to refuse license—Bombay Act VI of 1863, section 6—Specific Relief Act (I of 1877), section 45—Practice.

Section 6 of Bombay Act VI of 1863 empowers the Commissioner of Police in Bombay to grant licenses for public conveyances and provides that he "may in his discretion refuse to grant any such license for any conveyance which he may consider to be insufficiently found or otherwise unfit for the conveyance of the public." Under this section the Commissioner is bound to exercise his discretion in each case. This discretion is not an absolute one, but one which is to be exercised after he has made himself acquainted with the conveyance to be licensed and has considered whether it, as an individual carriage, is fit for the conveyance of the public.

Where it appeared that the Commissioner of Police had approved of a certain pattern of victoria as a public conveyance in Bombay and refused to license victorias which did not conform to that pattern,

Held, that his refusal on that ground was illegal, and under section 45 of the Specific Relief Act (I of 1877) he was ordered to issue the licenses asked for.

Per Russell, J.—Under rule 577 of the High Court Rules all applications under section 45 of the Specific Relief Act (I of 1877) should be made by motion and not by petition.

APPEAL from an order dated the 22nd September, 1902, made by Russell, J., ordering the Acting Commissioner of Police, Bombay (the appellant), to grant forthwith to the petitioner (respondent) licenses for ten victorias under the provisions of Bombay Act VI of 1863.

The respondent (petitioner) Taja Noora was an owner of public or hack victorias and earned his living by plying the same for hire in Bombay.

The appellant was the Acting Commissioner of Police in Bombay.

On the 13th September, 1899, the Commissioner of Police (Mr. Kennedy) issued the following notice:

^{*} Appeal No. 1236 re Act I of 1877.

GELL TAJA NOORA.

Superintendents of Police and Public Conveyance Inspectors are directed to inform the owners of hack victorias and rekhlas in their respective divisions that the annual inspection of public conveyances will commence on Tuesday the 10th day of October, 1899, and will conclude on the 15th January, 1900.

The backs and sides of victorias inside must be lined with good lining leather and the cushions covered with the same material.

The hood must be lined with superior dark blue or dark green broadcloth, the carriage properly painted and varnished and supplied with good harness Horses for use in public conveyances should be 14-2 hands and and lamps. upwards.

All the owners of hack victorias should be informed that no victorias will be passed unless the bodies of them are painted yellow.

All new victorias must be of the pattern victoria to be seen at the head Police office, and no victoria of size or shape other than of the pattern victoria will be passed after the 10th October, 1899. This victoria is to seat three passengers only.

All new rekhlas must have the entrance at the back with an iron step below.

Each owner of public conveyances must on bringing up the conveyance for inspection produce an application for a license setting forth that he is the real owner and that neither the conveyance nor horse nor harness is mortgaged.

On a conveyance coming up for inspection, the licensed driver must come up also with it, bringing with him two suits of khaki and breeches.

(Signed) H. KENNEDY,

Bombay, 13th September 1899.

Commissioner of Police.

One of the Inspectors of the Bombay Police swore that he personally communicated the effect of these orders to the petitioner Taja Noora, who resided in his district, and that to his personal knowledge Taja Noora attended at the head Police office and inspected the new pattern victoria kept there for the purpose.

In February, 1902, the petitioner was desirous of obtaining licenses under Bombay Act VI of 1863 for ten new victorias which he had recently built. On the 25th February, 1902, he requested to be informed when and where he should produce the victorias for inspection by the Acting Police Commissioner. The latter subsequently called at the petitioner's stables and inspected the victorias.

On the 10th March, 1902, the Solicitors of the petitioner wrote the following letter to the Acting Police Commissioner:

SIR,-We are instructed by Taja Noora that the Acting Deputy Commissioner called at his stable and inspected the victorias referred to in our letter to you of the 25th ultimo, but our client has not yet been supplied with the licenses to ply the victorias. Under the circumstances we have to request you to direct the licenses in question to be issued to our client without further delay.

Please let us know on what day our client should attend your office to receive the licenses.

(Signed) CRAWFORD, BROWN & Co.

To this letter the Acting Police Commissioner replied on the 17th March, 1902, as follows:

Gentlemen,—With reference to your letters of the 25th February last and the 10th instant to my address, I have the honour to inform you that I have myself seen your client Taja Noora and have given him to understand that he cannot have the licenses he applies for. My reasons for refusing to grant these licenses are as follows.

- 2. Three years ago Mr. Kennedy informed all owners of public victorias that after a certain date no victoria not built according to a certain pattern would be passed for hire, and in order that there should be no misunderstanding on the point he had a specimen conveyance kept at the head Police office for their guidance.
- 3. Your client Taja Noora was one of the owners so warned, and notwith-standing that the date so fixed expired two years ago, he has chosen to build a number of new victorias of the very type condemned by Mr. Kennedy. These are the conveyances I this morning saw. As he has taken upon himself to ignore what every other conveyance owner has submitted to, he has no one but himself to thank if he suffers any loss by the rejection of his conveyances.—I have, &c.

(Signed) H. G. Gell, Acting Commissioner of Police.

On the 18th March, 1902, the petitioner's Solicitors wrote the following letter to Mr. Gell, the Acting Commissioner of Police:

SIR,—We are informed by Taja Noora that he attended your office yesterday at 10 A.M., and produced for inspection by you his ten victorias, when you informed him that you declined to give him licenses to ply the same.

We are instructed to state that our client has incurred considerable expense over the victorias, and he will suffer great loss if he is not permitted to ply the victorias which, we are instructed, are in good condition and fit to be used by the passengers, and are of the same kind as many other public conveyances which ply for hire in Bombay.

We are further instructed to request you to state in what way you consider the victorias "to be insufficiently found or otherwise unfit for the conveyance of the public" within the meaning of section 6 of the Public Conveyances Act 1903.

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(Bombay Act VI of 1863), so that our client may know what alterations he is required to make so as to entitle him to obtain the necessary licenses to enable the victorias to be plied for hire.

An early answer will oblige.

(Signed) CRAWFORD, BROWN & Co.

To this letter the Acting Commissioner replied as follows:

Bombay, 18th March, 1902.

Gentlemen,—In continuation of my office No. $\frac{2871}{40}$ A of the 17th instant, I have the honour to inform you that if your client Taja Noora will call at this office he will be told in what way I consider his conveyances fail to come up to the proper standard.—I have, &c.

(Signed) H. G. Gell, Acting Commissioner of Police.

The licenses were refused. The petitioner, thereupon, presented a petition to the High Court under section 45 of the Specific Relief Act (I of 1877), praying for an order directing the Police Commissioner to grant licenses for the said ten victorias. In his petition he denied that he had ever seen any pattern victoria. After referring to section 6 of Bombay Act VI of 1863 he said:

- 7. It appears, however, from the said Acting Police Commissioner's letter of the 17th March, 1902, that he refused to grant the said licenses to me, not because he considered the said ten victorias to be insufficiently found or otherwise unfit for the conveyance of the public, or me to be unfit to be entrusted with the same (on which grounds alone, as I submit, the Police Commissioner was empowered to refuse to grant the said licenses), but because the said victorias did not conform to the pattern referred to in the said letter.
- 8. I say that my said ten victorias are substantially built, well equipped and in every way sufficiently found and fit for the conveyance of the public, and I say further that licenses have this year been granted by the said Acting Police Commissioner in respect of a large number of hack victorias of the same pattern as that of my said ten victorias.
- 9. I submit that the said Acting Police Commissioner had no power to refuse to grant to me the said licenses upon the grounds stated in his said letter or otherwise, and that his refusal aforesaid was and is illegal.
- 10. I do not know of and have been unable to ascertain the existence of any rule authorising the Police Commissioner to prescribe a pattern to be conformed to by all owners of conveyances intended to be plied for hire in Bombay, and I will, if necessary, contend that any rule purporting to give such authority is ultra vires and of no effect.

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14. I had shortly before the completion of my said ten victorias purchased good and costly horses to work in the same, but owing to the refusal of the said Acting Police Commissioner to grant me the said licenses the said victorias and horses are unused, and I have been ever since such refusal aforesaid and now am incurring considerable loss in respect of the same, inasmuch as I have to house and keep the same without earning anything thereby, and my property and my personal right to earn a living by plying the said victorias for hire have been and are being seriously injured.

The Acting Commissioner of Police (the appellant) in his affidavit stated as follows (paragraphs 3—8):

- 3. That it has always been the object of successive Commissioners of Police in Bombay to improve the class of public conveyances in Bombay in the interests of the public, and in furtherance of that object such changes have from time to time been introduced in the style of public conveyances as have appeared to be desirable.
- 4. As late as about 1882, so far as I remember, the public hack conveyance used in Bombay was a buggy seating two passengers and the driver, but numerous complaints from the public were made as to this style of public conveyance which was objectionable on various grounds and consequently an endeavour was made to introduce Hansom cabs and a style of conveyance called a victoria. The victorias were introduced, so far as I remember, between 1882 and 1884 and were then built to carry three passengers. In compliance with the wishes of the public, the pattern of public victoria was in 1893 altered so as to carry four passengers. This pattern of victoria for four passengers continued in use for some time, but in 1899 it became apparent that the class of horses obtainable and available for use and used in such public conveyances was not fit to pull such a heavy type of victoria and it became necessary in the opinion of Mr. Hartley Kennedy, the then Commissioner of Police, in the interests of the public to reduce the carrying capacity of public victorias to three passengers and to take steps that conveyances lighter in weight should be introduced, and it is this direction as to the style of new public conveyance which would be licensed which the said Taja Noora has admittedly neglected to pay attention to.
- 5. When the alteration was so decided upon in 1899, Mr. Hartley Kennedy considered that it would be easier and more beneficial for public conveyance owners to copy a pattern victoria than to follow specifications on paper and, therefore, a sample victoria was placed for inspection by such owners at the head Police office. The public conveyance owners without exception, and including Taja Noora, the applicant, inspected the sample victoria and intimated that they were quite ready to follow the directions given and made no objection to the style of victoria decided upon for future building and licensing, which they agreed was suitable for the class of horses used in Bombay public conveyances.
 - 6. With a view to obviating loss to the owners of public conveyances

Gell v. Taja Noora. Mr. Kennedy directed that, though no new conveyances thereafter built of the old pattern should be licensed, owners of public conveyances would be permitted to bring up to be licensed any victorias of the old pattern as had already been built before the date of the issue of the new directions, provided that such conveyances of old pattern were offered as substitutes for public conveyances condemned as unfit for further use.

- 7. Until recently Taja Noora brought up no new victorias of the old pattern to be passed for licenses and he admits in his petition that the victorias, which he now seeks to have licensed and which, I say, are of the obsolete pattern condemned by Mr. Kennedy, were built by him after the directions mentioned n paragraphs 4 and 6 hereof were issued by the Commissioner of Police.
- S. I am advised that the Commissioner of Police is justified in refusing to license a style of victoria which in his opinion is undesirable and unfit as a public conveyance in Bombay having regard to the interests and wants of the public and the quality of the horses obtainable and available for use and used in Bombay in public conveyances, and actuated by these considerations I have exercised the discretion vested in me and have refused to license the new victorias of Taja Noora, as I am of opinion that under the circumstances they are unfit for the conveyance of the public in Bombay.

The petition was heard by Russell, J., who after argument delivered the following judgment:

RUSSELL, J.:--On the 18th July, 1902, the applicant Taja Noora presented a petition under the Specific Relief Act (I of 1877) and Bombay Act VI of 1863, praying that the Commissioner of Police, Bombay, should be ordered to grant him licenses under Bombay Act VI of 1863 for ten victorias of which he is the owner.

I may mention, at the outset, that this procedure is wrong, for by rule 577 of the Bombay High Court Rules, applications under section 45 of the Specific Relief Act must be made by motion. In future if this procedure is not adopted, this Court will be compelled to reject the application. In the present case, however, I treat the petition as a notice of motion and affidavit in support thereof.

Paragraphs 1, 2, 3, 4, 5, 7, 8 and 9 of the petition set out the material facts and submissions of the applicant's case:

- 1. I am and for several years past have been earning my living by owning and plying for hire several public or hack victorias in Bombay.
- 2. In or about the middle of 1903 I commenced to have built ten new viotorias with the intention of plying the same for hire in Bombay, and the said

victorias were built in accordance with a pattern introduced by the late Police Commissioner, Mr. Vincent, and then (and now) commonly in vogue in Bombay.

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- 3. The said victorias were complete and ready for use on the 1st March, 1902, and on the 2nd March, 1902, I applied to Mr. Gell, then (and now) Acting Police Commissioner, to grant to me the necessary licenses for the same under sections 2 and 6 of Bombay Act VI of 1863 (an Act for the Regulation of Public Conveyances in the Town, Suburbs and Harbour of Bombay), and I produced the said ten victorias before the said Acting Police Commissioner for his inspection and orders, and duly complied with all the Police Rules relating to the grant of licenses as aforesaid, but the said Acting Police Commissioner refused to grant the licenses applied for by me.
- 4. The grounds upon which the said Acting Police Commissioner refused to grant the said licenses to me appear from his letter of the 17th March, 1902 [which has been set out above, page 309].
- 5. I am advised that upon the true construction of the provisions of the said Bombay Act VI of 1863, under which Act, I am advised, the Bombay Police Commissioner grants licenses for conveyances, the Police Commissioner has no power to refuse to grant to me the licenses applied for except under the proviso to section 6 of the said Act, and that save as aforesaid it is incumbent upon the Police Commissioner to grant to me licenses for my said victorias.
- 7. It appears, however, from the said Acting Police Commissioner's letter of the 17th March, 1902, that he refused to grant the said licenses to me, not because he considered the said ten victorias to be insufficiently found or otherwise unfit for the conveyance of the public, or me to be unfit to be entrusted with the same (on which grounds alone, as I submit, the Police Commissioner was empowered to refuse to grant the said licenses), but because the said victorias did not conform to the pattern referred to in the said letter.
- 8. I say that my said ten victorias are substantially built, well equipped and in every way sufficiently found fit for the conveyance of the public, and I say further that licenses have this year been granted by the said Acting Police Commissioner in respect of a large number of hack victorias of the same pattern as that of my said ten victorias.
- 9. I submit that the said Acting Police Commissioner had no power to refuse to grant to me the said licenses upon the grounds stated in his said letter or otherwise, and that his refusal aforesaid was and is illegal.

The reasons why the Commissioner of Police has refused to grant the licenses are thus set forth in paragraphs 3—8 of his affidavit of the 25th August, 1902 [above set out: see page 311].

From this and the other affidavits in the case I have come to the conclusion that the real and only ground on which the licenses have been refused is that the ten victorias in question do not conform to the pattern which Mr. Hartley Kennedy had

GELL v. Taja Noora. made and of which, I find on the affidavits, the applicant had due notice.

On the 13th September, 1899, the notice (Exhibit A to Mr. Power's affidavit of 10th September, 1902) was issued [which is set out above: see page 308].

The question arises, therefore, whether the Commissioner of Police is justified by law in requiring all hack victorias to comply with a "sealed pattern." Section 6 of the Bombay Act VI of 1863 provides as follows:

Licenses issued under section 2 of this Act shall usually be granted on the 1st January in each year, but the Commissioner of Police or Master Attendant may at any other time grant licenses, and shall always at the time of granting every license, and at all other times when necessary, cause to be painted and branded upon a conspicuous part of every such public conveyance such number and inscription as are required by section 2: Provided that the said Commissioner of Police or Master Attendant may in his discretion refuse to grant any such license for any conveyance which he may consider to be insufficiently found or otherwise unfit for the conveyance of the public, or to any applicant whom he may consider from youth, bad character, or for other reason unfit to be entrusted with the same.

The first point that occurs to me is that the section refers to the conveyance itself only. It does not refer in any way to the horse which is to draw the conveyance. It is clear from Mr. Gell's affidavit that the reason why the sealed pattern was adopted was that horses to draw heavy victorias are not easily procurable in Bombay. Nor do I find anything in that section which authorizes the Commissioner of Police to say that he will not license any victoria unless it is painted vellow and complies with the other details in the notice I have above referred to. In fact, it appears to me that if I am to hold that every victoria must conform to the sealed pattern I should do away with the discretion which the Commissioner of Police has to exercise under the Act. How a man is to exercise his discretion as to an object with regard to which he declines to exercise such discretion, unless the object complies with a "sealed pattern," I fail to see. I find direct authority for this in the case before the Court of Appeal in England of Wood v. Widnes Corporation.(1)

The head-note of that case runs as follows:

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Section 36 of the Public Health Act, 1875, which empowers a local authority to give notice requiring the owner of a house to provide a sufficient water-closet, earth-closet, or privy, and in case of non-compliance empowers the local authority to do the necessary works and recover the expenses, does not empower such authority to enforce a general resolution that in all such cases within their jurisdiction a particular system shall be adopted; but they are bound to exercise their discretion in each particular case, and consequently a notice in accordance with the general resolution and requiring compliance with its provisions is invalid.

The Lord Chancellor, in the course of his judgment, said:

I find it impossible to look at the dates of the various resolutions and notices without coming to the conclusion that it was the intention of the respondents to enforce a particular scheme of sanitation without reference to the exigencies in any particular case, and that notice was intended to carry out that view. The notice consequently was not one authorized by the statute.

In the same case A. L. Smith, L.J., expressed the following opinion:

I agree with the Division Court that this was an attempt to enforce a general scheme so that where there were defective closets they should be altered to others of a particular kind. When once that question of fact is arrived at, the judgment appealed against must stand. There is another ground upon which it can be supported—that this notice was one that ordered the provision of closets according to a particular plan to be found at the board room of the respondents, and intimated that if the work was not done in accordance with that plan, then the authority would themselves do the work, and charge the appellant with the expense. Supposing that the appellant did not like the plan approved by the respondents, but desired to put up water-closets of the latest type, his doing this would not have been a compliance with the notice; and on this ground I think the notice was bad, because it gave the appellant no option to put up, as required by the statute, sufficient closets.

Applying the reasoning in these judgments to the present case, it appears to me that, if the most perfect and up-to-date victoria was submitted for a license, the Commissioner of Police, according to his present argument, would be bound to decline to license it, because it did not comply with his sealed pattern.

While fully sympathising with the attempt of the Commissioner of Police to improve the victorias in Bombay, which are an eyesore, I cannot think that his action herein is justified by the section of the Act above set out.

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I accordingly grant the prayer of the petition. I order the Commissioner of Police to grant licenses forthwith in respect of the ten victorias in question. I order him to bear his own costs and pay half the costs of the petitioner, who is to bear half his own costs. I make this latter order, as I am satisfied on the affidavits that the petitioner's statements that he had no notice or knowledge of the pattern victoria are untrue.

The Acting Commissioner of Police appealed.

Scott (Advocate General) for the appellant (Commissioner of Police):—Section 6 of Bombay Act VI of 1863 gives the Commissioner absolute discretion. The Commissioner in his affidavit says that he saw the victorias in question and after inspection and using that discretion he refused the licenses. This Court will not interfere with his decision. The Judge below was wrong in holding that the licenses were refused because the victorias were not built according to a certain pattern. There is nothing to show that influenced the Commissioner. He, no doubt, had good reasons for refusing the licenses: Wood v. Widnes Corporation (1); Stat. 10 and 11 Vic., cap. 89.

Loundes for the respondent (petitioner) :- It is clear from the affidavits and the letters that the licenses were refused because the victorias were not of a certain pattern prescribed by the Commissioner's predecessor. That is not an exercise of his own discretion as required by the section. The section does not sanction an attempt to compel the use of a certain type of victorias. The discretion of the Commissioner must be applied to each particular case: see per Lord Halsbury in Wood v. Widnes Corporation(1); and it must be exercised only as to whether the vehicle is "insufficiently found or otherwise unfit." These words do not permit any regard to be paid to the fitness of the horses There is no discretion given as to that. used in the vehicles. It could not be said "that the question of whether a railway carriage was insufficiently found or otherwise unfit" included the question of the character of the engine that was to draw it.

BATTY, J.:- The questions in this appeal are whether the

Commissioner of Police, in refusing to grant license to the petitioner under section 6 of Bombay Act VI of 1863, exercised the discretion vested in him by that section. If he did so, then unquestionably the Courts could not interfere: Attorney-General v. Great Western Railway Company (1); Reg. v. Collins (2); Khando v. Appaji (3) and cases therein cited. But the ground of refusal should show that it was a ground to which the power extended: Queen v. Sykes (4); Ex parte Smith. (5) In this case the power given is to refuse a license only when the Commissioner considers that the conveyance for which it is required is insufficiently found or otherwise unfit for the conveyance of the public, or that the applicant is open to certain objections. This clearly calls for the exercise of discretion in each particular case, and "an exercise of the power in the fetters of self-imposed rules, purporting to bind the authority in all cases, would not be within the Act": Maxwell on Statutes, page 149. In Wood v. Widnes Corporation (6) the ultra vires action complained of had gone somewhat further and had attempted to enforce by notice the adoption of a particular system, and it was observed that had the notice merely been to the effect that it might be convenient to the public to know that a particular form of construction would satisfy the requirements of the Corporation, there could have been no harm in it. In the present case there is no question raised as to the invalidity of any such order prescribing uniformity, and the question here

depends rather on the applicability of the principle laid down by Turner, L.J., in Tinkler v. Wandsworth Board of Works, (7) that it is no less ultra vires to act in a particular case on such a general and self-imposed rule as to prescribe such a rule for uniform compliance in all cases. The question here, therefore, is not whether such a rule was made, but whether it was the reason on which the refusal of the license was based, excluding all consideration as to the individual fitness of each conveyance in

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question.

^{(1) (1877) 4} Ch. D. 735 at pp. 744-745.

^{(2) (1876) 2} Q. B. D. 30.

^{(4) (1875) 1} Q. B. D. 52.

^{(5) (1878) 3} Q. B. D. 374.

^{(3) (1877) 2} Bom. 370 at p. 373.

^{(6) (1898) 1} Q. B. 463.

^{(7) (1858) 2} DeG. & J. 261.

GELL v. Taja Noora. The adoption of principles approved by, or founded on the experience of, a predecessor in office is not necessarily open to objection, and might be desirable to maintain continuity. But the principles adopted must be strictly limited to the attainment only of those requirements which the Act enables the authority to enforce, and, when those requirements are satisfied, cannot prescribe variance in the mode of compliance.

It has been urged in appeal that the requirements of section 6 of the Act (Bombay Act VI of 1863) extend only to the equipments of conveyances and that the words "otherwise unfit" must be construed as relating only to defects ejusdem generis with the defects in equipment, and that neither of the expressions used would permit any consideration of the motive power to be employed. That the words "otherwise unfit," as more general than the preceding words "insufficiently found," may be limited But the phrase "insufficiently thereby, may be conceded. found "constitutes as the ground of objection, not the "findings" or "equipments," but their "insufficiency," and therefore limits objections on the ground of unfitness to "insufficiency," which is the only mode of unfitness mentioned, and not to the objects in which unfitness may be detected, which would be merely tautological and nugatory. The word "unfitness" is generic in relation to insufficiency, but has no such connection with equip-The phrase "otherwise unfit for the conveyance of the public" is, therefore, susceptible of being construed as "otherwise defective" for the purpose mentioned.

Now a license must under section 4 specify the number of horses or other animals by which the conveyance shall be drawn, and therefore in granting the license the Commissioner must necessarily consider, with reference to the number of horses to be specified, and the structure of the vehicle, whether it is defective for the purpose of conveying the public. If the number of horses provided is insufficient for that purpose, it is insufficiently found, and if defective in structure or material, it is otherwise unfit. If the motive power could be ignored, an immoveable machine might be approved. The line must manifestly be drawn before absurdity is reached. And the line has manifestly been drawn by the Legislature at insuitability

for the purpose designated, as to the existence of which, in each particular case, the Commissioner is the sole judge.

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The only question is, therefore, in my opinion, whether the Commissioner really considered the fitness for the purpose of these particular conveyances, not ignoring the sufficiency of the motive power to be specified in the license as among the accessories to be provided. This is a mere question of fact, and one as to which the Commissioner alone could supply the answer. A bare statement that these particular conveyances had been considered and held by the Commissioner to be unfit for the conveyance of the public on the ground that they were too heavy for the motive power provided, would have sufficed, but the Advocate General, who appears to support the appeal, is unable to point to any passage in the Commissioner's affidavit which contains such a statement. We have been asked to infer that the Commissioner must have meant that he had so considered the particular vehicles. But the affidavit was formally drawn up when legal advice as to what was required was available, and if the statutory condition had been fulfilled there could have been no difficulty in saying so. Nothing short of a clear statement to that effect ought, I think, to be accepted.

Reference has been made to a letter from the Commissioner to the Solicitors for the respondent, in which the Commissioner states that he had that morning seen the conveyances. The reason therein assigned is, however, not that on such inspection the conveyances appeared to the Commissioner insufficiently found or otherwise unfit, but that the petitioner had chosen to build new victorias of a type condemned and thus taken on himself to ignore a rule that every other owner of conveyances had submitted to. Whether the conveyances in question were, apart from their resemblance to the condemned type, insufficient or unfit is not distinctly affirmed in this letter. In paragraph 8 of his affidavit the Commissioner says: "Indeed I have exercised the discretion vested in me and have refused to license as I am of opinion that under the circumstances they are unfit, &c." The circumstances adverted to are manifestly those stated above and specially in paragraph 8, viz., the victorias were of an obsolete pattern built after the directions issued. So

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that the ground of refusal would appear to be that the pattern was disapproved and the directions contravened. The directions were, as already observed, ultra vires, and there is no power to refuse a license on the ground that a pattern is obsolete or open to objections, unless the Commissioner is able to say that in the particular instances before him the Commissioner is satisfied that the defects appearing in the pattern have been reproduced, which render them unfit for the conveyance of the public. The Commissioner may have meant this, but his language is more consistent with the inference that his refusal was based, not on defects noted in the particular victorias in question, but on defects observed in victorias of a similar type, which may or may not, for all that appears in the affidavit or correspondence, have been avoided in these particular instances. It is quite conceivable that a pattern may be preserved and its defects remedied by the use of other material or otherwise. I am not therefore satisfied that the decision of the lower Court is wrong and think the appeal should be dismissed with costs.

STARLING, J.:—Under Bombay Act VI of 1863, sections I to 6, provision is made for the granting of licenses in respect of land and water conveyances; and by section 6 a discretion is given to the Commissioner of Police to refuse to grant a license for any land conveyance "which he may consider to be insufficiently found or otherwise unfit for the conveyance of the public"; but under these provisions, while the Commissioner has a discretion, it is not an absolute one, but one which is to be exercised after the Commissioner has made himself in some way acquainted with the character of the carriage to be licensed, and has considered whether it, as an individual carriage, is fit for the conveyance of the public. In the exercise of this discretion he is not to fetter himself with rules which would prevent him in each case being quite free to consider the merits of each particular carriage.

Now, it appears that, on the 13th September, 1899, the Commissioner of Police, Mr. Kennedy, issued an order setting forth the details of construction which he required to be adopted in victorias presented for license, stating that he had had a sample victoria prepared, and that all new victorias must be of that

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pattern. It is clear, however, that the order is illegal, no authority to make it being given in the Act. If this order had been in a slightly different form, and had a note affixed thereto that it would be convenient to the owners of victorias to know that that particular form of victoria would satisfy the requirements of the Commissioner, there would have been no harm in it, but in its present form, in my opinion, it is bad. It is an attempt by the Commissioner to fetter the discretion vested in him by the Act: see Wood v. Widnes Corporation, a. Unauthorized as such an order was, it was still possible that the Acting Commissioner, Mr. Gell, might have exercised his discretion in respect of the victorias in question in this matter independently of this order. If it had appeared by Mr. Gell's affidavit that he had considered these victorias on their own merits, and that on such consideration he was of opinion that they were unfit for the conveyance of the public, this Court could not have interfered; but on going through Mr. Gell's affidavit and the other affidavits in the case made on his behalf, I find no indication of any such independent consideration. It is quite evident that his subordinates consider that these victorias should be rejected solely because they do not conform to the standard pattern introduced by Mr. Kennedy. Further, Mr. Gell's letter of the 17th March. 1902, states as follows: "My reasons for refusing to grant these licenses are as follows." Then follows a statement of Mr. Kennedy's directions about victorias, and the applicant's Solicitor is informed that his client's conveyances were of the condemned type and not in accordance with the sample pattern. and that if he suffers from their rejection it is his own fault. It is quite true that Mr. Gell says he has seen the victorias, but it is quite evident that all he considered in them was whether they were in accordance with the prescribed sample or not. Doubtless Mr. Gell, in the eighth paragraph of his affidavit, says: "I have exercised the discretion vested in me and have refused to license the new victorias of Taja Noora, as I am of opinion, under the circumstances, they are unfit for the conveyance of the public in Bombay"; but it is only "under the circum-

GELL v. Taja Noora. stances," and it is impossible to separate these few lines from the preceding paragraphs of the affidavit and the letter of the 17th March, 1902, since which time Mr. Gell does not suggest that he has given any fresh and independent consideration to the matter. Under these circumstances, I consider this case is on all fours with that of Wood v. Widnes Corporation, and the appeal must be dismissed with costs.

Appeal dismissed.

Attorneys for the petitioner-respondent—Messrs. Smetham, Byrne and Noble.

Attorney for the Commissioner of Police—Mr. E. F. Nicholson (Government Solicitor).

1) (1898) 1 Q. B. 467.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1903. February 9. NATHA KUPAJI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v.

MAGANCHAND MOTIJI AND OTHERS (ORIGINAL DEFENDANTS),

RESPONDENTS.**

Fraudulent conveyance—Transfer of Property Act (IV of 1882), section 53— Transfer to one creditor—Good faith.

One Byramji Kuverji died in June, 1896, indebted to several creditors. Immediately after his death his sons mortgaged his property to Moti Gelaji, one of his creditors. On the 11th August, 1897, another creditor, Jaitha Kupaji, obtained letters of administration to the estate of the deceased, and, as such administrator, sold the property to the son of the mortgagee, the latter having died. Subsequently the plaintiffs obtained a money decree against the estate and sued to establish their right to attach the property, alleging that the sale was void under section 53 of the Transfer of Property Act (IV of 1882). The lower Appellate Court held that the purchase was for value and that there was no evidence of fraud, and it dismissed the suit. On second appeal,

Held, (affirming the decree) that the sale was valid. The fact that it was a sale of the whole of the property of the deceased to one of his creditors made no difference. The only question was whether the transaction was in good

^{*} Second Appeal No. 389 of 1902.

faith and for proper consideration. The test of good faith in such cases is whether the transfer is a mere cloak for retaining a benefit to the grantor. On the findings of the lower Court it appeared that in this case it was intended that the grantee should have the property and keep it.

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SECOND appeal from the decision of H. L. Hervey, District Judge of Surat, reversing the decree of Ráo Sáheb M. B. Hora, Subordinate Judge at Surat.

The plaintiffs brought this suit to establish their right to attach and sell certain property in execution of a decree obtained by them on 28th September, 1899, against the estate of Byramji Kuverji, deceased, and his brother Manekji.

Defendants 1 and 2 claimed that the property was theirs, alleging that they had bought it on the 16th September, 1898, from the third defendant, who was the administrator of the estate of the deceased Byramji Kuverji, and the question raised in the suit was whether this sale was good against the plaintiff and other creditors of Byramji, having regard to the provisions of section 53 of the Transfer of Property Act (IV of 1882).

The plaintiff and one Moti Gelaji (father of defendants 1 and 2) and one Jaitha Kupaji were creditors of the deceased Byramji Kuverji and his brother Manekji Kuverji. Byramji died on the 24th June, 1896, intestate. On the 7th August, 1896, Byramji's three sons and his brother Manekji mortgaged the property in question with possession to Moti Gelaji (father of defendants 1 and 2) for Rs. 3,999, which sum was made up of Rs. 2,142-8-0 then due and a further advance of Rs. 1,856-8-0 made by the mortgagee at the time of the mortgage. Of the latter sum Rs. 1,000 was paid to Jaitha Kupaji and Rs. 856 to the plaintiffs, all of whom as above stated were creditors of the deceased Byramji and his brother Manekji.

At the date of this mortgage no letters of administration had been taken out to the estate of Byramji.

On the 11th August, 1897, Jaitha Kupaji (defendant 3) applied as one of the creditors for letters of administration and they were issued to him on the 5th July, 1898. Subsequently Moti Gelaji died, leaving two sons (defendants 1 and 2), of whom one (defendant 2) was a minor. A question as to the validity of the mortgage afterwards arose between the administrator

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(defendant 3) and defendant 1 which was referred to arbitration on the 31st July, 1898.

On the 1st August, 1898, the plaintiffs as creditors of the deceased gave notice to the administrator (defendant 3) not to alienate the property.

On the 5th August, 1898, an award was made in the arbitration, which recognised the mortgage made to Moti Gelaji. This was filed in Court and a decree in terms thereof was passed on the 30th August, 1898. The first defendant thereupon applied under section 257A of the Civil Procedure Code (Act XIV of 1882) and obtained the sanction of the Court for the satisfaction of the decree by the sale of the mortgaged property, and on the 16th September, 1898, the administrator (defendant 3) sold the said property to the first defendant for Rs. 4,999. This sum was made up of the mortgage debt, interest and charges and Rs. 300 paid in cash.

On the 28th September, 1899, the plaintiffs obtained a money decree against the estate of Byramji Kuverji and his brother Manekji Kuverji, and in the following November attached the said property in execution. The first defendant thereupon applied to the Court to raise the attachment. This application was granted and the plaintiffs were referred to a regular suit.

The plaintiffs accordingly in 1900 filed this suit to establish "their right to attach and sell the said property in execution," alleging that the sale thereof by the third defendant to the first defendant was fraudulent and collusive and without consideration.

The Subordinate Judge held that the sale was fraudulent and collusive, and he therefore set aside the sale and decreed the plaintiffs' claim.

On appeal, the District Judge found that "defendant I was a bond fide purchaser for value of the property which plaintiffs seek to attach and that he is not shown to have acted in fraud of the creditors of Byramji's estate." He therefore reversed the decree passed by the Subordinate Judge and dismissed the plaintiffs' suit.

The plaintiffs appealed to the High Court.

M. B. Chaubal and M. K. Mehta for the appellants (plaintiffs):—They referred to sections 269 and 282 of the Succession Act (X of 1865) and Doe Woodhead v. Fallow.(1)

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Manubhai Nanabhai for the respondents (defendants).

CHANDAVARKAR, J.:—This was a suit brought by the appellants (plaintiffs) against the three respondents (defendants) to establish their right to attach and sell certain lands in execution of a decree obtained by them on the 28th of September, 1899, against the estate of one Byramji Kuverji, deceased, and against his brother Manekji Kuverji.

Defendants 1 and 2 contested the claim on the ground (inter alia) that they had purchased the property on the 16th of September, 1898, from defendant 3, who had obtained letters of administration to the estate of the deceased Byramji. Defendant 3 admitted the sale to defendants 1 and 2, and pleaded that as the cause of action against him was different from that against defendants 1 and 2, he had been improperly made a party to the suit.

The Subordinate Judge who tried the suit decreed the plaintiffs' claim, but in appeal the District Judge of Surat has rejected it.

It is necessary to state at the outset certain facts, which are either admitted or undisputed, as on them turn the questions of law which arise in the case. Byramji Kuverji and Manekji Kuverji were brothers. The plaintiffs, defendant 1's father and defendant 3 were their creditors. Byramji Kuverji died on the 24th of June, 1896, leaving him surviving his widow Meherbai and three sons, Pestonji, Framji and Hormasji, and his brother Manekji Kuverji. On the 7th of August, 1896, Byramji Kuverji's three sons and Manekji Kuverji mortgaged the property in dispute to defendant 1's father for Rs. 3,999. Out of this sum Rs. 2,142-8-0 formed the debt due to the latter from Byramji Kuverji and Manekji Kuverji, and the remaining Rs. 1,856 were paid in cash by the mortgagee. Out of this sum of Rs. 1,856, Rs. 1,000 were paid to defendant 3 and Rs. 856 to the plaintiffs, both of these being creditors of the two brothers.

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At the time of this mortgage no letters of administration had been taken out to the estate of the deceased. The mortgage was, therefore, invalid. But on the 11th of August, 1897, defendant 3, as one of the creditors of the deceased, applied for letters of administration and obtained them on the 5th of July, 1898. On the 31st of July, 1898, defendant 1 and defendant 3 referred to private arbitration the question as to the validity of the mortgage obtained by the former. On the 1st of August, 1898, the plaintiffs, as creditors of the deceased, gave notice to defendant 3 not to alienate the property. On the 5th of August, 1898, the private arbitration resulted in an award recognising the mortgage in favour of defendant 1's father. On the 23rd of August defendant 1 filed the award in Court, and obtained a decree in terms thereof on the 30th of August, 1898.

Defendant 1 applied for and obtained sanction from the Court to settle the decree under section 257A of the Code of Civil Procedure. Accordingly, on the 16th September, 1898, defendant 3, as administrator of the property, sold it to defendant 1 for Rs. 4,999. This amount of the consideration for the made up as follows: Rs. 3,999, which was the consucration of the mortgage; Rs. 500 interest on Rs. 3,999; Rs. 70 for the stamp and registration fees of the sale-deed; Rs. 94 due on a samadaskat dated the 27th of April, 1896; and Rs. 300 paid in cash. It is this sale by defendant 3 to defendant 1 which the appellants seek to set aside as a fraudulent and collusive transaction. The District Judge has found that it is neither fraudulent nor collusive, but his finding is impeached before us mainly on the ground that he has not considered the question, material to the case on the pleadings, whether, though there was no collusion or fraud, there was an intent on the part of defendants 1 and 2 to defeat or delay creditors.

Mr. Chaubal, in arguing this second appeal, has taken his stand on the first clause of section 53 of the Transfer of Property Act. The proviso to that section, however, lays down that nothing in the preceding part of it shall impair the rights of a transferee in good faith and for consideration. Here the District Judge has found that there was proper and sufficient consideration for the sale, and the question is whether his finding that

there was neither fraud nor collusion necessarily implies that it was a bond fide transfer. It was said that defendant 3 had sold the whole of the property to one of the creditors (i. e., defendant 1) for an existing debt and a cash advance, and that that was a badge of fraud because the deed of sale was nothing less than a preference of this particular creditor; but in Alton v. Harrison(1) it was held that it makes no difference in regard to the Statute of Elizabeth whether the deed sought to be set aside as void deals with the whole or a part of the grantor's property; and that view was followed in Ex parte Games.(2) In the former of those cases the assignment was for an existing debt and in the latter, as in the present, it was for an existing debt and a cash advance. The only question in such cases is whether the transaction is bond fide, i. e., whether it is protected by good faith. The test of good faith which has been applied in English decisions on similar cases arising under Statute 13 Eliz., c. 5, from which section 53 of the Transfer of Property Act is substantially borrow-side whether the transfer is, to use the words of fard, L.J., in Alton v. Harrison, (1) "a mere cloak for

retaining a benefit to the grantor." See also Ex parte Games, In re Bamford. (2) And it must be taken on the District Judge's findings here that the deed was not a mere cloak, but that it was intended thereby that the grantee should have the property and keep it.

But Mr. Chaubal has presented several arguments with a view to show that the finding as to consideration is not sound in law. In the first place, he contends that as the mortgage to defendant 1 by the sons and brother of the deceased Byramji Kuverji was invalid, having been made at a time when no letters of administration to the deceased's estate had been taken out, it could not form a proper consideration for the sale. The mortgage was undoubtedly invalid; but the fact stands, apart from the mortgage, that Rs. 2,142-8-0 were due from the mortgagors, that Rs. 2,142-8-0 were due from the deceased Byramji to respondent 1, that Rs. 1,856 were received by the mortgagors in cash at the date of the mortgage and paid to two of the deceased's creditors, of whom the appellant was

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Had the mortgage been set aside, defendant 1 would have been relegated to the position of a creditor of the deceased's estate to the amount at least of Rs. 2,142-8-0; and the remaining amount of Rs. 1,856 having been paid by him for the benefit of the deceased's estate and having gone into the pockets of the deceased's creditors, it was quite within the power of defendant 3, as administrator of the deceased's estate, to recognise it as a debt due from that estate to defendant 1. The Subordinate Judge in this case doubted whether after the mortgage defendant 1 could have fallen back on his original right as a creditor; but as the mortgage was not one by any person legally representing the deceased's estate, that defendant could as against it claim still as its creditor, if the estate could repudiate the mortgage. It was not contended before us that as to this amount of Rs. 1,856 there could be no privity between defendant 1 and the estate so as to make the latter liable for it: nor could such contention avail the plaintiffs, seeing that, as found by the District Judge, they had been assenting parties to the transaction. The mere fact, then, that the mortgage was invalid, is not sufficient in law to deprive the sale of the consideration which in substance existed.

Secondly, Mr. 'Chaubal attacked the consideration for the sale on the ground that part of the debt due to defendant 1 was barred by limitation at the date of the sale. The amount of this part is only Rs. 873, and even assuming that it was barred, it cannot be held on that account that there was no consideration for the sale and that the deed is void in toto. If the purchaser under such circumstances proves that the greater part of the consideration has been satisfied, the fact that a small part of it is still legally due is not sufficient to vitiate the sale for want of consideration. The argument that part of the consideration was barred at the date of the sale rests on the allegation that there is no evidence to show that Rs. 72 were paid by Barjorji as Byramji's agent. But neither in the Court of first instance nor in the District Court was any point raised questioning Barjorji's agency; at any rate the District Judge's judgment does not show that it was raised, and his finding as to Rs. 2,142-8-0, which admittedly included Rs. 801 minus Rs. 72

paid as interest by Barjorji, must be accepted as one amounting to a finding that Rs. 801 were not barred at the date of the sale.

But it was urged that, supposing the main consideration for the sale was not the mortgage but the amount of the debt due to defendant 1 from the deceased's estate, according to section 282 of the Indian Succession Act he as one of the creditors had no right of priority over others, and that it was the duty of defendant 3 to divide the assets of the deceased equally and rateably among all the creditors, instead of selling the deceased's property to defendant 1 and thereby in effect giving him priority which he could not have legally claimed. That, however, raises a question which does not arise in the present case. plaintiffs sue here to set aside the sale to defendant 1 as fraudulent and collusive and without consideration. If the sale is not tainted on any of the grounds alleged, their action must fail. Under section 269 of the Indian Succession Act defendant 3 could sell the property as he thought fit. It may be-as to which we express no opinion -that the plaintiffs have a right of action against defendant 3 and defendant 1 on the ground that there has not been a proper administration of the estate of Byramji; but they must bring a suit for administration claiming proper relief on behalf of all creditors: Burjorji v. Dhunbai.(1) The present suit is brought by the plaintiffs in their own interests to try the validity of the deed of sale to defendant 1, and as the deed is protected by good faith and consideration, the suit must fail. If any authority were required for that, Alton v. Harrison. (2) already referred to, supports it. We must confirm the decree

Decree confirmed.

(1) (1891) 16 Bom. 1.

(2) (1869) L. R. 4 Ch. 622.

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with costs.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1902. December 22. DHONDIRAM BIN LAXMON (OBIGINAL DEFENDANT), APPELLANT, v. TABA SAVADAN AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Limitation—Suit is instituted when plaint presented—Plaint presented insufficiently stamped—Deficiency subsequently paid—Limitation Act (XV of 1877), section 4—Civil Procedure Code (Act XIV of 1883), sections 48 and 54—Account—Barred item—Interest not allowed on barred item of account.

Where a plaint was presented on the 14th September, 1900, with an insufficient stamp, but the deficient stamp duty was paid on the 18th September, 1900.

Held, that, for the purpose of limitation, the suit was instituted on the day on which the plaint was presented, viz., the 14th September, 1900, and not on the day on which the deficient stamp duty was paid, viz., the 18th September, 1900.

In an account, interest cannot be allowed on items that are barred by limitation. Interest is but an accessory, and when the principal is barred the accessory falls along with it.

FIRST appeal from the decision of Ráo Bahádur Lallubhai P. Parekh, First Class Subordinate Judge of Poona.

The plaintiffs sued to recover from the defendant money due on an account, and the lower Court passed a decree in their favour for Rs. 5,778-2-0 with interest and proportionate costs.

The defendant appealed and objected to the Judge's finding as to certain items in the account. To one item of Rs. 700, dated the 14th September, 1897, which the lower Court had allowed against the defendant, he objected (inter alia) that it was barred by limitation, contending that the suit had not been filed until the 18th September, 1900.

It appeared that the plaintiffs presented the plaint on the 14th September, 1900, on an insufficient stamp and were ordered to pay the deficient stamp duty, which they did on the 18th September, 1900. The defendant contended that the suit was not instituted until that day and that consequently the item of Rs. 700 was

barred. The defendant also objected that the lower Court had allowed interest on items that were barred.

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Branson (with Sitaram S. Patkar) for the appellant (defendant):—
The suit was not legally instituted until the proper stamp duty was paid, viz., on the 18th September, 1900: section 28 of the Court Fees Act (VII of 1870); Balkaran Rai v. Gobind Nath (1); Jainti Prasad v. Bachu Singh (2); Durga Singh v. Bisheshar Dayal (3); Venkatramayya v. Krishnayya. (4) Interest on barred items cannot be given.

Raikes (with Shivram V. Bhandarkar) for respondents (plaintiffs):—The suit was instituted on the 14th September, 1900, when the plaint was presented. Neither the Limitation Act nor the Civil Procedure Code declares that a plaint cannot be presented unless fully stamped. The Court cannot reject a plaint unless the plaintiff fails to pay the deficiency of stamp duty within the time fixed by the Court: see section 54 of the Civil Procedure Code (Act XIV of 1882); Bai Anope v. Mulchand (5); Moti Sahu v. Chhatri Das (6); Huri Mohun v. Naimuddin (7); Assan v. Pathumma (8); Surendra Kumar v. Kunja Behary (9); Janakdhary Sukul v. Janki Koer. (10) No point was taken in the lower Court as to interest on time-barred items. The defendant should have asked for a review of judgment.

Jenkins, C.J. (after dealing with the objections to certain items in the account, continued):—To this item of Rs. 700 the further objection is urged that it is barred, as the suit must be deemed to have been instituted on the 18th September, 1900. The plaintiff on the other hand contends that the suit was instituted on the 14th September, 1900, and that consequently the plea of limitation does not apply. This contest arises from the fact, that the plaint when presented on the 14th of September was written upon paper insufficiently stamped and the requisite stamp was not supplied until the 18th September, 1900. The

^{(1) (1890) 12} All. 129.

^{(2) (1893) 15} All. 65.

^{(3) (1898) 24} All. 218.

^{(4) (1897) 20} Mad. 319.

^{(5) (1885) 9} Bom. 355.

^{(6) (1892) 19} Cal. 780.

^{(7) (1892) 20} Cal. 41.

^{(8) (1899) 22} Mad. 494.

^{(9) (1900) 27} Cal. 814.

^{(10) (1900) 28} Cal. 427,

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question therefore arises, whether the suit was instituted when the plaint was first presented, or when the further requisite stamp was supplied.

Section 4 of the Limitation Act provides that every suit instituted after the period of limitation prescribed therefor should be dismissed, and in the explanation to the section it is said that the suit is instituted in ordinary cases when the plaint is presented to the proper officer. This explanation is in substantial accord with section 48 of the Civil Procedure Code, which provides that every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf. In this case the relief sought was properly valued. The consequence of the insufficient stamping is indicated in section 54 of the Civil Procedure Code, which provides that the plaint shall be rejected if the relief sought is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff on being required by the Court to supply the requisite stamp paper within the time fixed by the Court fails to do so. Therefore the power of rejection does not arise merely because the plaint is written upon paper insufficiently stamped; there must be the additional circumstance of a failure on the part of the plaintiff to supply the requisite stamp paper within the period fixed. Admittedly no such failure has occurred in this case; the requisite stamp paper was supplied within the time fixed by the Court. Therefore it cannot be said that there has in this case been a legal rejection of the plaint.

But then it is said that there has been no such presentation of the plaint as is necessary for the due institution of the suit. But neither the Limitation Act nor the Civil Procedure Code ordains or implies that in the absence of a sufficient stamp there can be no presentation: on the contrary the very power to reject bestowed by section 54 of the Code implies that the plaint has been presented within the meaning of section 48 of the Civil Procedure Code and section 4 of the Limitation Act. This view is no doubt opposed to that entertained in the Allahabad High Court (see Balkaran Rai v. Gobind Nath Tiwari⁽¹⁾; Jainti Prasad

v. Bachu Singh⁽¹⁾; and Durga Singh v. Bisheshar Dayal⁽²⁾), but it is in accord with the decisions of the Calcutta High Court (Moti Sahu v. Chhatri Das⁽³⁾ and Huri Mohun v. Naimuddin⁽⁴⁾) and is supported by the cogent reasoning of Mr. Justice Subramania Ayyar in Assan v. Pathumma.⁽⁵⁾ In this Court the point is uncovered by authority and in the circumstances we hold that on a true reading of the Limitation Act the suit was instituted for the purposes of limitation on the 14th September, nor is this conclusion disturbed by anything contained in the Court Fees Act: see sections 6 and 38.

Next it is objected that interest has been allowed on time-barred debts. This seems to be the fact and we think the objection is well founded. The interest is claimed not by virtue of an independent contract for its payment, but under Act XXXII of 1839 which provides that upon all debts or sums certain payable at a certain time or otherwise, the Court before which such debts or sums may be recovered may, if it shall think proper, allow interest to the creditor. But this does not authorize the allowance of interest where the debt on which it is claimed is irrecoverable. Interest in cases like the present is but an accessory, and when the principal is barred the accessory falls along with it: Hollis v. Palmer. (6) Therefore so much of the claim must be disallowed as is made up of interest on principal sums now time-barred. As the parties cannot agree, this amount must be determined in execution, and then must be deducted.

The decree must be varied accordingly. The costs of appeal will be in proportion.

Decree varied.

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^{(1) (1893) 15} All. 65.

^{(2) (1898) 24} All. 218.

^{(3) (1892) 19} Cal. 780.

^{(4) (1892) 20} Cal. 41.

^{(5) (1899) 22} Mad. 494.

^{(6) (1836) 2} Bing. N. C. 713.

APPELLATE CIVIL.

Before Mr. Justice Batty and Mr. Justice Starling.

1903. February 2. BALVANT BABAJI DHONDGE (ORIGINAL PLAINTIFF), APPELLANT, c. HIRACHAND GULABCHAND GUJAR (ORIGINAL DEFENDANT), RESPONDENT.*

Execution sale—Certificate of sale not conclusive as to the property sold at execution sale—Civil Procedure Code (Act XIV of 1882), sections 316, 317.

A decree on a mortgage directed that the whole interest of five brothers in the mortgaged house should be sold. The proclamation of sale stated also that the whole interest in the house was to be sold. The sale took place and the plaintiff was the purchaser. By a mistake, however, on the part of the officer in charge of the sale, the memorandum of sale, the certificate of sale and the receipt of possession passed by the plaintiff omitted to mention the names of four of the brothers and erroneously stated that the interest only of one of them had been sold. The defendant subsequently obtained a money decree against some of the other brothers and, in execution, sold their interest in the house, purchased it himself and took possession of a part of the house. The plaintiff, thereupon, brought this suit to eject him. The lower Appellate Court dismissed the suit, holding that in ejectment the plaintiff was bound to give strict proof of his title and that the certificate of sale was conclusive evidence of the property which had been purchased by him. On appeal,

Held, reversing the decree of the lower Court, that the plaintiff was entitled to a decree. The certificate of sale was not conclusive as to the property which had been purchased by the plaintiff. The property offered for sale and bid for by the plaintiff was the property ordered to be sold and proclaimed for sale. What was sold to the plaintiff was the interest mentioned in the Court's order and proclamation, and the sale of that property became absolute by the order which confirmed the sale.

SECOND appeal from the decision of F. C. O. Beaman, District Judge of Poona, reversing the decree of L. G. Fernandez, First Class Subordinate Judge.

Suit by the plaintiff for possession of a house purchased by him at an execution-sale.

The house in question had belonged to one Ramji Mane, who died leaving a widow, Bhagubai, and five sons, viz., Yashvant, Dada, Dhondu, Baburao and Santram, of whom the last three were minors. After Ramji's death, his widow Bhagubai and the

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eldest son Yashvant, acting as managers of the family, mortgaged the house with possession to Babaji Ishvar, the plaintiff's father, for Rs. 1,000. Babaji subsequently sued the widow and the five sons on the mortgage and obtained a decree against all of them in the First Class Subordinate Judge's Court at Poona on the 12th April, 1894. The decree directed a sale of the house in default of payment of the mortgage-debt. Default having been made the plaintiff applied for execution of the decree against all the defendants in that suit and a proclamation of sale of the whole house was issued. The liláv yád (memorandum of sale), however, drawn up by the bailiff in charge of the sale, erroneously stated that it was the right, title and interest of Yashvant in the house that was to be sold. At the auction-sale the whole house was purchased by the plaintiff (the son of the mortgagee, then deceased). On the 8th November, 1895, the plaintiff was put into possession. The certificate of sale and the receipt passed by the plaintiff followed the liláv yád (memorandum of sale), and, although describing the whole property, mentioned only the "right, title and interest of Yashvant therein" as the property dealt with.

On the 12th November, 1895, the three younger brothers (Dhondu, Baburao and Santram) applied to be restored to possession, alleging that Yashvant was not the sole owner and that only his right, title and interest had been sold. Their application was rejected on the 14th January, 1896.

Meanwhile, the defendant in this suit obtained a money decree against Bhagubai (the widow) and Dada (the second brother) in the Court of Small Causes at Poona, and in execution of his decree he attached the house in question and at the sale purchased the right, title and interest of his judgment-debtors therein, and took possession on the 19th January, 1897, by removing the lock which had been placed on the door by the plaintiff.

The plaintiff, therefore, brought this suit for possession and damages.

The defendant contended that the plaintiff was entitled only to Yashvant's share (viz. one-fifth) of the house and that his suit should be for partition only.

The Subordinate Judge found that the plaintiff had proved his title to the whole house and passed a decree accordingly.

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On appeal by the defendant, the Judge reversed the decree. He held that in an ejectment suit the plaintiff must be held to strict proof of his title: that in this case the proof of his title rested on the sale certificate, and that inasmuch as that certificate showed a purchase only of Yashvant's interest in the house, the plaintiff was not entitled to eject the defendant. He, therefore, dismissed the suit.

In his judgment the Judge said:

The defendant appeals on the ground that the plaintiff must be strictly limited to the title he is able to prove. That title, he contends, is the sale vertificate, and nothing else. He relies on section 216 of the Civil Procedure Code and cites two cases (22 W. R. 408; 15 Cal. 546) which, though not directly in point, do emphasize the importance of the sale certificate as the primary source of a purchaser's title. Now, although I think that the judgment of the lower Court gave effect to what is probably the justice of the case, yet I feel obliged to admit that the point taken by the appellant is good and must prevail. It may be a hard case for the plaintiff, but hard cases make bad law. It appears to me indisputable that in a suit for ejectment, the plaintiff must rely upon what title he can prove, and that where the suit is of this nature, his title is his sale certificate. If that sale certificate contains a misdescription, the plaintiff ought to have seen to getting it corrected in time. But can it be said that the sale certificate here does contain a misdescription? It is in agreement with the sale yad, and whether or not the bailiff misunderstood his instructions and failed to sell all that he ought to have sold, the sale ydd which he makes at the time on the spot probably does record accurately what he in fact did.

In this view of the case although I think that the plaintiff was entitled to have had the entire interest sold, that he intended to have had the entire interest sold, and that the Court would have supported him in that intention had it been disputed, yet now he has only his sale certificate by which to prove his title, and that sale certificate does not prove the title upon which alone the decree of the lower Court could be sustained. I must; therefore, allow this appeal and dismiss the suit of the plaintiff. But feeling as I do that while he is technically wrong he has substantial justice on his side, I direct that each party bear his own costs throughout.

The plaintiff preferred a second appeal.

Mahadev B. Chaubal (and Narayan M. Samarth) for the appellant (plaintiff):—The Court below was wrong in holding that the certificate of sale was the plaintiff's sole and conclusive titledeed. We contend that in order to determine his title, that is, the interest he purchased, the other documents in the case, viz., the decree, the order upon his application for execution and the pro-

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clamation of sale, must be taken into consideration. The decree obtained by the plaintiff directed that the whole house, that is, the interest of all the defendants in that suit, viz., Bhagubai, Yashvant and his four brothers, should be sold. The order on plaintiff's application for execution was to the same effect. The proclamation of sale also stated that the whole house was to be put up for sale. Therefore the understanding was that the whole house was to be sold. It was sold and plaintiff bought it, and having done so and having paid for the entire interest in the house, he is now entitled to possession of the whole: Mahabir Pershad v. Moheshwar Nath (1); Nanomi v. Modhun Mohun (2); Bhagbut Pershad v. Girja Koer. (3) The certificate of sale merely shows that the sale proceedings had come to an end on the date mentioned therein; that the transaction had become complete and the property had vested in the purchaser: section 316 of the Civil Procedure Code (Act XIV of 1882). It is a ministerial act of the Court, and not a judicial determination of title: Vithal Janardan v. Vithojirav Putlajirav.(4) A mistake committed by an officer of the Court conducting an execution sale cannot alter or nullify the effect of the decree and the contractual relation created by the proclamation of sale framed in terms of the decree and the order for sale.

After the plaintiff purchased the house, Yashvant's three brothers, whose names were not mentioned in the memorandum of sale or the certificate of sale, applied to the Court to be restored to possession of the house on the ground that their interest therein was not affected by the sale, but their application was rejected. This shows that what was intended to be sold and was actually sold and purchased by the plaintiff was the interest of all the defendants and not of Yashvant only.

Ganpat S. Rao for the respondent (defendant):-Although it may have been the intention to sell the interest of all the defendants, yet what was actually sold at the auction sale was the interest of Yashvant only. The sale of that interest only having been confirmed and a certificate to that effect having been issued

^{(1) (1889) 17} Cal. 584.

^{(3) (1888)} L. R. 15 I. A. 97; 15 Cal. 717.

^{(2) (1885)} L. R. 13 I. A. 1; 13 Cal. 21. (4) (1882) 6 Bom. 586.

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by the Court, the plaintiff cannot now contend that he purchased the right, title and interest of Bhagubai, Yashvant and his four brothers. It is the certificate of sale that is the muniment of plaintiff's title. If there was any mistake in the memorandum of sale and the certificate of sale, the plaintiff ought to have got it corrected. Until that is done the plaintiff has no remedy. Even the receipt for possession passed by the plaintiff shows that he acquired the interest of Yashvant only. When the defendant purchased the house in execution of his Small Cause Court decree, the right, title and interest of his judgment-debtors, namely, Bhagubai and Dada, were not affected by the plaintiff's purchase. The fact that the application of Yashvant's three brothers for restoration of the house was rejected cannot affect the defendant, because he was not a party to that proceeding.

The plaintiff's certificate of sale is conclusive against him: Mookhya Huruckraj v. Ram Lall (1); Lalla Bissessur v. Doolar Chand (2); General Manager of the Raj Durbungah v. Maharaja Kumar Ramaput Singh. (3)

BATTY, J.:—The lower Appellate Court has stated the facts of this case as follows:

The plaintiff in this case had obtained a decree against all the five brothers: his darkhást was against all five brothers. The proclamation of sale announced that the complete interest in the house, subject to the mortgage, was to be sold, but that, when the bailiff made the sale yád, he recorded that only the right, title and interest of Yashvant (the eldest brother) was being sold. The confirmation order repeats the terms of the sale yád; so does the sale yád and the tábé (possession) yád. The plaintiff was put in possession of the whole house. There was a miscellaneous application by three of the brothers objecting to the result of the sale, but this was rejected. The defendant then sold (sie) the right, title and interest of his debtors (the mother and one brother) and took possession of the house.

On these facts the lower Appellate Court held that the plaintiff was bound by the misdescription in the sale certificate, and reversed the decree of the Court of first instance. In effect the lower Appellate Court has held the certificate of sale the sole and conclusive evidence of the plaintiff's title as auction purchaser,

notwithstanding that it is in conflict with the decretal order, the order on the *darkhást* for the sale and the proclamation of sale. The plaintiff has appealed against this decision.

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There is nothing in section 316 (and nothing has been pointed out in any other part of the Code) which makes a certificate of sale conclusive as to the property sold. It is a significant fact that the words in section 259 of the Code of 1859 (Act VIII of 1859), which gave a certificate of sale such effect, have been omitted in the present Code. That section required the Court to grant a certificate to the person who may have been declared to be the purchaser, to the effect that he has purchased the right, title and interest of the defendant in the property sold, and declared that such certificate shall be taken and deemed to be a valid transfer of such right, title and interest. The Legislature, in advisedly abstaining from reproducing these words, has apparently deprived the certificate of sale of the effect formerly given to it, and has left the question of what property has passed to be determined by the actual sale itself or, in the words of the Privy Council, by what the purchaser has "bargained and paid for." The certificate is, so far as regards the parties to the suit and those claiming through or under them, determinative as to the date from which the property actually sold vests in the purchaser, and section 317 renders it also practically determinative, in the absence of fraud or the like, as to the identity of the purchaser. Neither section gives it operation to determine what has been sold. Section 316 requires that a certificate shall be granted stating the property sold. That is to say, it is the duty of the Court, not to determine what property is to pass by the sale, but merely to record the already accomplished fact of a transaction that has taken place and to state what has been sold. The Court has no power to do more or to alter the fact of the sale which has actually taken place. Its action in granting the certificate is ministerial and not judicial: Vithal Janardan v. Vithojirav Putlajirav.(1)

The sale is a transaction, and consists, as all contracts do, of an offer and acceptance. The offer is made by the Court exercising, in the place of the judgment-debtor and on behalf of his creditor,

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It is urged that the *liláv yád*, said in this case to have been prepared by the bailiff, was a document required by rules framed under section 287 of the Code. But such rules are at most directory for the guidance of the Courts in exercise of their duties, and could not either supersede the provisions of the Code or impose duties of enquiry upon, or otherwise affect, the rights or responsibilities of the outside public.

The case of Gowree Kumul v. Surut Chunder. (1) relied on by the lower Appellate Court, was one relating to a sale held in 1859 and apparently subject to the Code of that year. Its effect, moreover, is to declare that a purchaser, receiving a certificate going beyond the order for sale, cannot avail himself of anything in the certificate beyond the order. The case of Prem Chand Pal v. Purnima Dasi,(2) also cited by the lower Appellate Court, appears to have turned upon the construction of section 54 of a Bengal Act (XI of 1859), except so far as it held section 316 of the Code conclusive as to the date from which the title vested. For the respondents, the case of Mookhya Huruckraj v. Ram Lall, (3) which appears to have been decided under the Code of 1859, and which dealt only with the misconstruction of the certificate based on inferences from irrelevant documents, was relied on. The case of Lalla Bissessur v. Doolar Chand, 4 also relied on by the respondent, appears to be another decision under the Code of

^{(1) (1874) 22} Cal. W. R. 408.

^{(2) (1888) 15} Cal. 546.

^{(3) (1870) 14} Cal. W. R. 435.

^{(4) (1874) 22} Cal. W. R. 181,

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1859, and therefore ruled that the Court, according to its sale certificate, had expressly sold the rights and interest of the judgment-debtor alone.

Again, it is urged for the respondent that even supposing the actual sale was, by the order of the Court directing it and according to the proclamation, a sale extending to the interest of all the five brothers, yet the Court confirmed only the sale of Yashvant's interest. A reference, however, to sections 312 and 314 shows that it is the actual sale which the Court confirms, and not any transaction which by inadvertence, fraud or collusion may have been described in any reference to the sale made in a document subsequent thereto. For section 312 requires that if no application be made under section 311, or if any such be made and disallowed, the Court shall pass an order confirming the sale as between the parties to the suit and the purchaser. A subsequent purchaser of the interest of one of the parties is therefore bound by the sale confirmed, and, if the sale of that interest has been confirmed, cannot avail himself of any misstatement in a subsequent document which purports to vary the transaction confirmed. The real question in such case. under the present Code of Civil Procedure, seems therefore to be what was the sale, i.e., what was bargained and paid for, and that must depend not on erroneous statements of what was offered for sale, but on what was actually offered for sale and bid for. What was offered for sale was determined by the order of the Court and the proclamation, and if the order has been carried out and the property sold accordingly, that sale and nothing else must be taken to have been confirmed, whatever words of description referring to the transaction may have been inserted in the order confirming it or in the certificate stating it. There is no allegation that there is evidence, nor is there any finding, in this case that the property offered and bid for was anything but the property ordered to be sold and proclaimed for sale; and I therefore think that the property sold to the plaintiff was the interest mentioned in the Court's order and proclamation, and that the sale of that property became absolute by the order which confirmed the sale. The result will be that the decree of the lower Appellate Court must be reversed and that of the Court

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STARLING, J .: - In this case, under a mortgage dated 28th July, 1901, one Yashvant and his mother Bhagu mortgaged the house in suit, which belonged to the family of which they were members, consisting of Yashvant, his mother and four brothers. Plaintiff's father sued the whole family and got a decree against them for the sale of the whole house. Plaintiff applied for execution of the decree against all the defendants in that suit, which was granted, and a proclamation was issued for the sale of the whole property against all the defendants. The plaintiff purchased the property. Although the order for sale and the proclamation were in respect of the whole house, yet the lilav yaid prepared by the bailiff mentioned the name of Yashvant only, and in the order for the confirmation of the sale and the certificate of sale, although the whole property was described, yet at the end thereof appeared the words "right, title and interest of Yashvant therein." On the strength of this, three of the brothers applied that the plaintiff might not be put in possession of their shares, but the application was refused and the plaintiff was put in possession of the house, which he locked up. Subsequently the defendant brought a suit against the mother and one of the sons other than the three last mentioned. and obtained a money decree against them, on which he attached and sold their right, title and interest in the said house, which he purchased himself. In execution he was put in sole possession, the plaintiff's lock being taken off. On this the plaintiff brought this suit.

The sole question in this appeal is the interest which the plaintiff took in the house by his purchase thereof under the mortgage decree. There is no doubt that the decree gave him the right to have the whole house sold; the proclamation announced to the world that the Court was about to sell the whole house, and what the Court offered for sale the plaintiff purchased. That the Court thought it had sold the whole house is evident from the fact that it disallowed the application of the three brothers to prevent possession being given to the plaintiff. The question to be considered is whether the insertion of the words

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"right, title and interest of Yashvant" in the confirmation of sale and the sale certificate necessarily limits the interest actually purchased to that possessed by Yashvant in his own right. It seems to me that there was gross carelessness, at the least, in the bailiff who made out the lilavyad, and in the clerk or clerks who prepared for the signature of the Judge the order confirming the sale and the certificate of sale, in not following the terms of the proclamation of sale; and I might suggest that it would be well if the Judge himself, when signing such important documents as these, were to take the trouble to see that the property described in the documents he signs corresponds with that proclaimed for sale. On the Original Side I have never signed a confirmation of sale without seeing that the description of the property therein corresponded with that actually put up for sale.

Can, then, the words "right, title and interest of Yashvant" be held to include the whole of the property? Following the principles of the rulings in the Privy Council, I am of opinion that they can. Those words convey nothing in themselves: surrounding circumstances must be looked at to see what their extent is. In the present case the mortgage was by Yashvant and Bhagu only, the former being the eldest member of the family, yet the Court held that they had the right and were entitled to bind the whole family. Of course it was Yashvant's act, as the eldest male member of the family, which bound them. Further, looking to the fact that the Court evidently intended to sell the interest of the whole family and the plaintiff to purchase the same, I am of opinion that what was described under the terms "right, title and interest of Yashvant" was what the Court had already determined had been validly mortgaged by his act, and consequently what the plaintiff purchased and that to which he was entitled under the certificate of sale is the whole house and nothing else. Under these circumstances, the defendant purchased nothing by the sale under his decree, as the defendant in this suit had nothing left in them to sell.

The appeal must therefore be allowed, the decree of the lower Appellate Court reversed and that of the Subordinate Judge restored with costs.

Decree reversed.

PRIVY COUNCIL.

P. C.* 1902. Nov. 20, 21. 1903. February 10. THE GAEKWAR SARKAR OF BARODA AND ANOTHER (DEFENDANTS) v. GANDHI KACHRABHAI KASTUROHAND (PLAINTIFF).

Railway Company—Negligence in construction of railway—Suit for damage to land by causing water to flood it—Indian Railways Act (IX of 1890), sections 7-13—Acting in excess of statutory powers in construction of railway—Suit for damages.

The defendants, by the negligent construction of a railway made in exercise of their powers under the Indian Railways Act (IX of 1890), caused the plaintiff's land to be flooded in the rainy season and consequently damaged. That Act provides that a suit shall not lie to recover compensation for damage caused by the exercise of the powers thereby conferred, but that the amount of such compensation shall be determined in accordance with the Land Acquisition Act, 1870.

Held, it being shown that the defendants had exceeded or abused their statutory powers, that the plaintiff's remedy was by suit for damages, and not for compensation under the Act.

Statutory powers under such an Act are to be exercised with ordinary care and skiil and with some regard to the property and rights of others; they are granted on the condition, sometimes expressed and sometimes understood—expressed in the Railways Act of 1890, but if not expressed always understood—that the undertakers "shall do as little damage as possible in the exercise of their statutory powers."

Lawrence v. Great Northern Railway Company, (1) Broadbent v. Imperial Gas Company, (2) Bagnall v. London and North-Western Railway Company, (3) Ricket v. Metropolitan Railway Company, (4) and Geddis v. Proprietors of the Bann Reservoir (5) referred to.

APPEAL from a decree (12th February, 1900) of the High Court at Bombay, which affirmed with modifications a decree (17th April, 1899) of the Subordinate Judge of Ahmedabad in favour of the respondent in a suit in which he was plaintiff.

The suit was brought for damages for injury alleged to have been caused in 1894, 1895 and 1896 to the plaintiff's fields by the negligence of the defendants in the construction and working of

^{*} Present: Lord Machaghten, Lord Lindley, Sir Arthur Wilson, and Sir John Bonser,

^{(1) (1851) 16} Q. B. 643. (3) (1861) 7 H. & N. 423; (1862) I. H. & C. 544.

^{(2) (1857) 7} DeG. M. & G. 436. (4 (1867) L. R. 2 E. & I. App. 175 (202). (5) (1878) 3 A. C. 430 (455).

the Viramgam-Mehsana Railway, which was owned by the first defendant, the Gaekwar of Baroda, and had since it was opened been under the control and management of the second defendant, the Bombay Baroda and Central India Railway.

The plaint, filed on 17th June, 1897, alleged that the plaintiff was owner and occupier of certain fields near and in the village of Kokta under Viramgam; that the Gaekwar of Baroda in or about 1891 caused to be constructed and opened for traffic a Railway line between Viramgam and Mehsana, a portion of which line was on an embankment and lying within the village of Kokta; that the second defendant had worked and managed the said Railway line under an agreement of 17th June, 1893. made between the Government of the Gaekwar and the second defendant; that in the course of constructing the Railway the defendants made on each side of the embankment between Dabhla, some four miles north of Kokta, and Kokta, excavations or burrow pits, from which to supply the earth necessary to make the embankment for the line; that the burrow pits when first made had divisions of earth between them, but from the neglect or other acts or omissions of the defendants, such divisions were removed or destroyed or washed away, so that such burrow pits formed continuous water-courses or gutters on each side of the embankment, extending at least from Dabhla to Kokta, down which in the rainy season the water flowed; that prior to the construction of the said Railway, during the rainy season, the surface water from the villages of the first defendant, the Gaekwar of Baroda, in the Kadi Pargana, lying to the north of Kokta, passed westward from Kariana to Chanothia and thence away to the west and never reached Kokta, but after the construction of the Railway embankment which ran between Chanothia and Kariana, and in consequence of the insufficiency of the culverts and waterways provided by the defendants, and in consequence of their negligence in permitting the formation of the said gutters, the flow of such surface water had been altered and it now was discharged and overflowed on to the plaintiff's fields at and near Kokta; that in consequence of the flooding of his land the plaintiff had been compelled to relinquish some of his fields, had had to sell others at small prices,

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and the remainder had for the most part become incapable of cultivation and the crops raised in them had suffered material damage.

The plaintiff therefore claimed as damages Rs. 29,050, and prayed also for an injunction and decree directing the defendants to make arrangements by which the rain-water in the monsoon should pass by Kariana to the west as it formerly did and should not cause injury to the plaintiff's fields.

The defendants, in their written statements, denied the plaintiff's allegations as to the damage and put him to proof of them. They also pleaded that if the plaintiff has suffered any damage he should have proceeded in accordance with the provisions of the Indian Railways Act (IX of 1890) and not otherwise, and that the suit was not maintainable; that under the provisions of section 10 of the said Act the plaintiff was debarred from bringing his suit; that if the plaintiff had suffered any damage. such damage could have been foreseen, and should have been assessed under the provisions of section 10 of the said Act, and the Land Acquisition Act (X of 1870); that any damage was caused by the heavy rainfall, and that such rainfall being due to the act of God, the defendants were not liable; that the suit was barred by the Indian Easements Act (V of 1882); and that the line of Railway having been constructed with all such accommodation works as in the opinion of the Governor-General in Council were necessary and sufficient under the provisions of the Indian Railways Act (IX of 1890), section 11, the Court had no jurisdiction to grant an injunction or pass a decree as claimed by the plaintiff.

The issues raised these defences.

The Subordinate Judge of Ahmedabad found that the damage had been caused to the plaintiff's fields by the negligent and careless construction and management of the Virangam-Mehsana Railway, and by the burrow pits that had been made to supply earth for the embankment having been permitted to become channels through which the water flowed southwards; and held that the plaintiff was not debarred by any provisions of the said Acts from maintaining his suit. He gave the plaintiff a decree for Rs. 17,507-6-8 and ordered that the defendants

should within six months raise a construction on their line to the north of Kokta, and make the necessary arrangements to prevent the water going to the gutters, side-cuttings and trenches of the Railway, and flooding the plaintiff's land.

From that decision the defendants appealed, and the High Court (*Parsons* and *Ranade*, JJ.) varied the decree of the Subordinate Judge only as to the amount of damages, giving a decree for Rs. 12,132. In other respects they confirmed the decree of the lower Court.

As to the question that the suit was not maintainable, the High Court said:

Parsons, J.:-The next objections taken, on behalf of the defendants, are based on sections 10 and 11 of the Railways Act. It was argued that compensation should have been asked for under section 10, and that the present suit will not lie. The answer to the argument depends on the answer to be given to another question, namely, in doing what they have done in the present case have the defendants been exercising the powers conferred on them by either section 7, section 8 or section 9 of the Act? Sections 8 and 9 have no application and can be disregarded. Section 7, clause (a), gives the power to make embankments, culverts, &c. No compensation, however, has been awarded in respect of the exercise of these powers. Clause (b) gives power to divert and alter the course of rivers, brooks, streams or water-courses, or raise or sink the level thereof in order the more conveniently to carry them over, or under, or by the side of the Railway. The defendants have not exercised these powers, because, as found by the Subordinate Judge, no water-course exists, and it is the flow of surface water only that has been obstructed and diverted. Even, however, if it be assumed that the course of flow of this surface water from Kariana to Chanothia and thence westward amounted to a water-course, I fail to see how the act of the defendants in allowing the water to flow for some four miles by the sides of their line and then discharging it on to the land of the plaintiff can be said to have been an exercise of the power conferred by this clause. It was evidently not the intention of the contractors of the line to so divert the flow of water. They intended that it should flow, as before, to the west, and for that purpose they made a culvert in the embankment at Dabhla. This apparently answered its purpose, because for some years we find no complaint was made, and the water was not turned south. The cause of the diversion evidently was the negligence of the defendants in allowing the excavations on the sides of the line that had been made to supply earth for the embankment to become channels for the water to flow southwards. Had it not been for this negligence, it is clear, as I have before said, that all the water that had actually passed through the culvert would have pursued its original course, and although there might have been an accumulation of water on the east of

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the line, that, unless very large, would not have flowed down south. Again section 10 can only be applicable to damage which was the result of the exercise of the powers and could have been foreseen. Here the power exercised was the erection of an embankment and the making of a culvert. This did no injury. It might reasonably have been supposed that the culvert had been made sufficiently large to carry off the water. The chief, if not the sole, cause of the injury, namely, that the side trenches were allowed to become water-courses, was quite unconnected with the exercise of any power conferred by section 7 and was the result of negligence, that could not have been foreseen, the mischief probably growing worse only gradually year after year.

I am, therefore, of opinion that the present is a case in which the plaintiff could not have asked for any compensation under section 10, and that the suit is not barred by it.

It is a little difficult to understand the ground of the objection taken, that the suit would not lie having regard to the terms of section 11 of the Act. That section says that a Railway administration shall make such accommodation works 'as will, in the opinion of the Governor-General in Council, be sufficient at all times to convey water as freely from or to the lands lying near, or affected by, the Railway as before the making of the Railway, or as nearly so as may be.' There may be force in the argument that the law has thus left it to the Governor-General in Council to decide upon the sufficiency of the works to be erected for the purpose specified, and that the person, whose lands might be affected by insufficient works, must apply to that authority for redress and could not sue in a Civil Court either for damages for what he alleged to be the result of insufficient accommodation, or for an order directing additional works to be constructed; but this argument clearly cannot apply to the plaintiff. The purpose stated in the section for which the works are to be constructed is to convey water as freely as before from, or to, certain lands, and the aggrieved person is the owner of those lands. The lands of the plaintiff, before the making of this Railway, had the water from Kariana conveyed neither to, nor from, them. He could, therefore, have made no application in respect of them. There is no provision in the Act for recovery of compensation for damage caused by the construction or non-construction of the works enumerated in this section. persons, who own lands other than those mentioned in the section, are injured, their remedy must be the ordinary one by suit, and there is nothing in the Act which bars this remedy, still less can there be any bar to the present suit, in which the plaintiff alleged and has proved injury, not so much by the construction or non-construction of accommodation works as by the construction of the Railway line itself generally, and especially by the negligence in that the line was allowed to become a channel for discharging on to his land water which, before the construction, never came near it.

RANADE, J.:—The fact of negligence being thus proved, the question of law, whether plaintiff was entitled to bring this suit for damages and injunctions, has next to be considered. It is quite plain that, if there had been no

proof of negligence and the injury had been the unavoidable result of the proper exercise, by the Railway Company, of the powers vested in it by law, the defendants would have been protected from any civil suit, even if damage had resulted from the exercise of that power. Section 10 of the Act expressly provides that as little damage as possible should be done in the exercise of powers conferred by sections 7, 8 and 9 and that a suit shall not lie to recover compensation, and plaintiff's remedy would obviously be to apply to the Governor-General in Council, who alone is vested with control over these matters. If special or larger accommodation works were needed, that relief also could be claimed only under section 11 or under section 12, but by means of an appeal to the same authority. The case is, however, altered when the act, which has caused the damage, is not the result of a proper exercise of the powers conferred, but is due to the neglect or carelessness of the Railway Company in the execution of its powers. The distinction has been well illustrated in the case of accidental fires caused by a spark. Where the damage done by the spark was not shown to have been the result of negligence, the Company was held not to be liable, the reason assigned being that, when the Legislature sanctioned and authorized the use of a particular thing, and it is used for that purpose, the sanction carries with it the consequence that, if damages result from it, the Company is not responsible: Vaughar v. Taff Vale Railway Company (1) and Halford v. The East India Railway Company. (2) But where negligence is proved in the matter of a fire caused by the spark, the damage done was held to be actionable. Action lies even for authorized acts if they are done negligently. If the damage could have been prevented by the reasonable exercise of powers conferred, it was held to be a case in which an action can be maintained. The decision in Rylands v. Fletcher(3) may also be consulted with advantage on this point. Applying this principle, the defendants in this case are obviously not protected, as the damage is proved to be the result of their Agent's carelessness and neglect. Neither section 10 nor section 12 of the Railways Act prevents such a suit. In the present case, the Governor-General in Council has expressly permitted this suit, as one of the parties is His Highness the Gaekwar of Baroda, and it is not likely that this permission would have been granted if the Government had been satisfied that other relief could be given to the plaintiff under the provision of that Act. I therefore agree with Mr. Justice Parsons on both the points raised in this appeal.

F. Balfour Browne, K.C., and Mayne for the appellants.

J. Jardine, K.C., and Kenyon S. Parker for the respondents.

The contentions on behalf of the appellants are sufficiently stated in their Lordships' judgment. The Indian Railways Act (IV of 1890), sections 10 and 11, was referred to.

(1) (1860) 5 H. & N. 679.

(2) (1874) 14 B. L. R. 1.

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Counsel for the respondents were not heard.

The judgment of their Lordships was, on the 10th February, 1903, delivered by—

LORD MACNAGHTEN: - The respondent, who was plaintiff in the suit, is the owner of lands in the village of Kokta and its neighbourhood. He complained that since the making of the Mehsana-Viramgam Railway his lands had been flooded in the The Railway, which was constructed by the rainy season. Gaekwar of Baroda, was finished in 1891. Ever since it has been under the control and management of the Bombay Baroda and Central India Railway Company, by whom it is still worked. The respondent brought his suit against the Gaekwar with the consent of the Governor-General in Council as required by section 433 of the Civil Procedure Code and also against the Railway Company. His case was that the mischief of which he complained was occasioned by the negligent manner in which the works of the Railway had been constructed and maintained. He claimed damages and an injunction.

The Subordinate Judge of Ahmedabad and the High Court of Judicature at Bombay both found in favour of the respondent on the question of negligence and concurred in awarding damages and an injunction, though the damages assessed by the Subordinate Judge were reduced in amount by the High Court. Both defendants appealed to His Majesty. But the Railway Company did not lodge a case or appear by counsel to support their appeal.

The concurrent finding of the two Courts was hardly disputed before this Board. The negligence proved appears to have been of a very gross character. Before the Railway was made the surface water of a district four miles distant from Kokta, which was abundant in the rainy season, used to pass away to the westward without coming near the respondent's lands. The Railway, which there runs north and south, was constructed on an embankment. The embankment was designed with so little skill that no proper provision was made for the passage of the surface water. The greater part of it being obstructed by the embankment flowed down by the east side of the line and

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drowned the respondent's lands. The mischief was increased by the fact that a series of excavations or burrow pits, as they are called, from which earth had been taken to form the embankment, were turned into a continuous channel by the action of the water washing away the barriers left between them. A similar thing happened on the other side of the Railway and some of the water that did pass through the embankment ran down a channel formed on the western side of the line and also found its way on to the respondent's lands.

The Railway was constructed under the Indian Railways Act, 1890, and is subject to the provisions of that Act.

The Act of 1890 provides that a suit shall not lie to recover compensation for damage caused by the exercise of the powers thereby conferred, but that the amount of such compensation shall be determined in accordance with the provisions of the Land Acquisition Act, 1870. It also provides that the Governor-General in Council is to determine in case of difference what accommodation works are required for the convenience of adjoining owners.

In these circumstances their Lordships were much surprised to hear the arguments addressed to them at the Bar. The leading counsel who appeared for the Gaekwar contended, first, that inasmuch as the Act of 1890 authorized the undertakers to construct all necessary embankments, this embankment as constructed was an authorized work and that the statutory authority conferred by the Act of 1890 (though in fact no statutory authority was required by the Gaekwar for the construction of an embankment on his own land) actually protected the Gaekwar from any claims connected with or arising out of negligent or defective construction. In the second place he contended that although the statutory authority of the Act of 1890 might have been abused or exceeded, no suit would lie, and that the respondent's only remedy was by proceeding for compensation under the Land Acquisition Act, 1870. And, lastly, he gravely argued that what the respondent really required in order to protect himself from the mischief caused by the negligence of the appellants was some additional accommodation works or something in the nature of

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v. Gandri Kachrabhat. accommodation works which it was the respondent's business to define and submit for the approval of the Governor-General in Council.

It would be simply a waste of time to deal seriously with such contentions as these. It has been determined over and over again that if a person or a body of persons having statutory authority for the construction of works (whether those works are for the benefit of the public or for the benefit of the undertakers, or, as in the case of a Railway, partly for the benefit of the undertakers and partly for the good of the public) exceeds or abuses the powers conferred by the Legislature, the remedy of a person injured in consequence is by action or suit, and not by a proceeding for compensation under the statute which has been so transgressed. Powers of this sort are to be exercised with ordinary care and skill and with some regard to the property and rights of others. They are granted on the condition sometimes expressed and sometimes understood-expressed in the Act of 1890, but if not expressed always understood-that the undertakers "shall do as little damage as possible" in the exercise of their statutory powers: Lawrence v. Great Northern Railway Company (1); Broadbent v. The Imperial Gas Company (2); Ricket v. Metropolitan Railway Company (3); Geddis v. Proprietors of the Bann Reservoir (4); Bagnall v. London and North-Western Railway Company.(5)

Their Lordships are, therefore, of opinion that the appeal must be dismissed, but they think that it will be better that the injunction should be in general terms, restraining the defendants from flooding the lands of the respondent or causing or permitting them to be flooded by the works of the Mehsana-Viramgam Railway. It would be inconvenient if the Court were to direct the execution of specified works which it has no power to supervise, which might not be approved by the paramount authority, and which after all might not effect the object in view.

^{(1) (1851) 16} Q. B. 643.

^{(3) (1867)} L. R. 2 E. & I. App. 175 (202).

^{(2) (1857) 7} DeG. M. & G. 436. (4) (1878) 3 A.C. 430 (455). (5) (1861) 7 H. & N. 423: (1862) 1 H. & C. 544.

Their Lordships will, therefore, humbly advise His Majesty that with this variation the order appealed from should be affirmed and the appeal dismissed. As regards costs, the order will be against both the appellants.

Appeal dismissed.

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Solicitors for the appellant—Messrs. Dollman and Pritchard. Solicitors for the respondent—Messrs. Holman, Birdwood & Co.

PRIVY COUNCIL.*

VINAYAK WAMAN JOSHI RAYARIKAR (ONE OF THE DEFENDANTS)

v. GOPAL HARI JOSHI RAYARIKAR (PLAINTIFF) AND OTHERS
(DEFENDANTS).

1903. Feb. 11, 12.

Partition—Inám village granted by Peishva—Right of management of Inám property—Claim that Inám village was impartible—Right of succession—Custom.

The defendant in a suit for partition alleged that his branch of a joint family to which an *inam* village had been granted by the Peishwa had, under the grant acquired a right to the perpetual management of the village, and claimed on this and other grounds that the village was impartible.

Held, by the Judicial Committee (affirming the decision of the High Court), that "neither by the terms of the original grant nor of the subsequent orders of the ruling power, nor by family custom, nor by adverse possession..... has the defendant's branch of the family acquired a right to perpetual management of the village of Ahire, or in consequence to resist its partition."

Adrishappa v. Gurushidappa(1) referred to.

APPEAL from a decree (7th January, 1896) of the High Court at Bombay which reversed a decree (28th October, 1893) of the Subordinate Judge of Poona, by which the suit brought by the first respondent had been dismissed.

The suit was brought against the present appellant and the other members of a joint family for partition of an *inám* which was granted to six brothers of the family in 1762, but which

^{*} Present: Lord Macnaghten, Lord Lindley, Sir Andrew Scoble, Sir Abthur Wilson, and Sir John Bonser.

^{(1) (1880)} L. R. 7 I. A. 162: J. L. R. 4 Bom. 494.

VINAYAK v. Goral. had been from the time of the grant uniformly managed by Chinto Vithel, the youngest of the six brothers, and his descendants. The claim was resisted by the present appellant, who was defendant No. 13, on the ground that he was entitled to manage the property, and to divide the profits among all the co-sharers according to their shares; and that the plaintiff was therefore not entitled to partition.

The Subordinate Judge held that the property was indivisible and dismissed the suit; but on appeal the High Court (Farran, C. J., and Parsons, J.) granted the partition.

The facts are sufficiently stated in the judgment of the High Court which is reported in I. L. R. 21 Bom. 458, and in their Lordships' judgment. With reference to the yadis referred to in the latter judgment the High Court said:

In 1820 it appears that disputes arose between the sharers, and by a yadi (Exhibit 78) it was agreed "that Madhavrao should manage the village with which we are dealing and the two other villages and account for the receipts and pay the five brothers' equal shares without practising fraud." It was further by the same yadi agreed "that Rs. 200 should be deducted for the collection of the income, and that the balance should be distributed amongst all, and that Madhavrao should receive one-sixth share." With reference to this yadi it is to be remarked that no reference is made in it to any right on the part of Madhavrao to manage. His management is recorded to be based on agreement. The same remark applies to the subsequent yadi (Exhibit 79). Madhavrao soon after the date of this yadi appears to have disagreed with his mother Umabai. Exhibit 30 is a yadi (dated in 1822) by which terms are arranged for the settlement of the dispute, amongst which is one that Umabai should manage the villages until Madhavrao should attain twenty years of age. This document has been much relied on as showing that it was then considered that the management of the villages was of right with Chinto's branch but such an agreement might consistently have been come to whether the management was with that branch by consent for convenience of enjoyment, or whether it was considered that its members had a hereditary right to the management. The other co-sharers were not parties to it, and we think that no inference of any weight can be drawn from it.

In 1830 an agreement (Exhibit 79) was come to between Madhavrao's son Waman and all the co-sharers, the terms of which are of great importance. It recites that the villages had belonged to Madhavrao and to other co-sharers and that Madhavrao had managed them and distributed the shares, and continues: "In consequence of family disputes the management of the villages was with Trimbakrao Balkrishna from 1820 down to the present time. It is now agreed with the consent of the five coparceners that the said villages should be managed by me (Waman), and that the income of the villages should be divided accord-

ing to the respective shares." The agreement then sets out the manner in which the management was to be carried on and provides that Waman should deduct Rs. 200 per annum from the revenues for the management, and concludes thus: "I, Waman, will manage the villages agreeably to the said terms and pay each sharer the amount of his share. Should I fail to pay the income, any one of the six copareeners should manage the villages as agreed above to which I give my consent." This is the last document in evidence save the decision of the inam Commissioners in 1857 (Exhibit 82), which continues the inam to the descendants of the original grantees.

On this appeal which was heard ex parte, Mr. Mayne for the appellants contended that the grant was in the nature of an endowment, it being intended (as is the case with endowments) that the income should be distributed amongst the co-sharers, but that the management should remain in the hands of one member of the family. That this was understood to be the intention was shown by the conduct of the members of the family, who had never divided this property though a separation has taken place between them, and had left the management of it to one branch of the family. By custom the property had so become impartible and the management, having always remained in the appellants' line of descent, has become vested in him and his descendants. The decision of the High Court was, therefore, it was submitted, erroneous, and should be set aside.

Their Lordships' judgment was, on the 12th February, 1903, delivered by—

LORD MACNAGHTEN:—This is an appeal ex parte against a decree of the High Court of Bombay reversing the decision of the Subordinate Judge of Poona, who dismissed the plaintiff's suit.

The plaintiff sued for partition of the village of Ahire. It is not disputed that he is entitled to a one-fifth share in the village; but the suit was resisted by one of the co-sharers, the present appellant, on the ground that the management of the village is vested in him and his branch of the family, and that the proper inference to be drawn from this circumstance, from the documents in evidence, and from the acts and conduct of the members of the family ever since the date of the original grant, is that the village is impartible.

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The village was granted in 1762-63 by the Peishwa to six brothers, who were Brahmins, in consideration of their devotion to religious worship, and the arduous services performed by the youngest brother, Chinto Vithal. The grant does not declare the property to be impartible, nor does it say anything about the management of the village, but, in fact, Chinto Vithal acted as manager, paying his brothers their share of the income. Afterwards the village was attached, but ultimately in 1800 the attachment was removed, and the Peishwa regranted or continued the inám to Chinto's son. Having thus got into possession, he attempted to appropriate the whole income and refused to recognise the interest of the five elder brothers. The representatives of the elder brothers preferred a complaint to the Peishwa, from which it appears that the brothers had then become separate. An inquiry followed, and an order was made to the effect that in future the representatives of all six brothers (the line of one brother, it may be observed, is now extinct) should receive equal shares. The management, however, was left in the hands of Chinto's son, and notwithstanding some disputes it has ever since remained in the hands of that branch of the family. But there are two yadis, one in 1820 and one in 1830, which, in their Lordships' opinion, show conclusively that it was by the consent of the other co-sharers that the management was continued in Chinto's line. That was also the opinion of the High Court.

The argument on behalf of the appellant rested on no solid foundation. It could not be contended that the original grant, or any document emanating from the ruling power, showed that it was intended that the inam should be impartible. The argument rather was to this effect: that, although the original grant fell short of proving that the property was impartible, yet there was, so to speak, a savour of religious endowment about the Peishwa's grant, and that this, taken in conjunction with the conduct of the family, the fact that, although the brothers separated, there was never any claim for the partition of this property until quite recently, and the fact that, although there were on more than one occasion disputes or complaints of mismanagement, Chinto's branch held their position, justified the inference that, either according to the true intent of the grant properly understood, or by family custom gradually developed, the inám was or had become impartible.

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Their Lordships agree with the conclusion arrived at by the High Court, (1) that "neither...... by the terms of the original grant nor of the subsequent orders of the ruling power, nor by family custom, nor by adverse possession (if such there could be in a case like this), has Chinto's branch of the family...... acquired a right to perpetual management of the village of Ahire or in consequence to resist its partition."

It may be worth while to refer to a case Adrishappa v. Gurushidappa (2) the head note of which is that "Deshgat water or property held as appertaining to the office of Desai is not to be assumed primâ facie to be impartible. The burden of proving impartibility lies upon the Desai; and on his failing to prove a special tenure, or a family or district or local custom to that effect, the ordinary law of succession applies."

Their Lordships will, therefore, humbly advise His Majesty that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the appellant-Messrs. T. L. Wilson & Co.

(1) (1896) 21 Dom. 458 at p. 462.

(2) (1880) L. B. 7 I. A. 162

ORIGINAL CIVIL.

Before Mr. Justice Russell.

JAIRAMDAS GANESHDAS AND, ANOTHER, PLAINTIFFS, v. ZAMONLAL KISSORILAI, DEFENDANT.*

1903. February 16.

Iniunction—Temporary injunction to restrain suit brought by defendant in the Small Causes Court—Civil Procedure Code (XIV of 1882), sections 492, 493—Specific Relief Act (I of 1877), sections 53, 54 and 56.

In a suit by plaintiffs in the High Court to recover damages for breach of contract, they sought to obtain an interlocutory injunction restraining the defendant from proceeding with a suit filed by the defendant against the plaintiffs in the Small Causes Court in respect of the same contract until the hearing of the High Court suit.

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Held, that an application to restrain a suit in the Small Causes Court does not come within the provisions of sections 492 and 493 of the Civil Procedure Code.

The provisions of the Civil Procedure Code as to temporary or interlocutory injunctions are not the same as those under the Judicature Act, 1873, section 25, sub-clause 8. As the injunction asked for is a perpetual one, it can, under the Specific Relief Act, only be granted by the decree made at the hearing.

THE plaintiffs sued to recover from the defendant Rs. 1,730 and interest thereon at 9 per cent. from the 22nd June, 1900, till payment, alleging that the defendant had purchased from them one hundred bales of cotton deliverable between the 15th and 20th May, 1900, but had failed to take delivery. The plaintiffs thereupon sold the cotton by auction and now sued for the loss incurred by such sale.

The plaint further stated as follows:

The defendant on the other hand falsely claimed from the plaintiffs Rs. 779-6-0, being the amount of difference between the contract rate and the market rate on the 25th May, 1900, and has filed a suit, being Suit No. 21205 of 1902, against plaintiffs in the Court of Small Causes at Bombay.

The plaintiffs deny their liability to the defendant, but on the other hand claim from the defendant Rs. 1,730-5-0 as stated above.

The plaint prayed for judgment for the said sum of Rs. 1,730, and further prayed that in the meantime and until the hearing of this suit the defendant might be restrained by injunction from proceeding with the said suit, No. 21205 of 1902, in the Court of Small Causes at Bombay.

On the presentation of the plaint on the 21st January, 1903, the plaintiffs obtained a rule *nisi* for an injunction restraining the defendant from proceeding with his suit in the Small Cause Court. The rule now came on for hearing.

Inverarity for the defendant showed cause:—The Court has no power to grant the injunction asked for. The plaintiffs ask for a temporary injunction restraining the defendant from proceeding with his suit in the Small Cause Court until this suit is heard. Temporary injunctions, however, can only be granted under sections 492 and 493 of the Civil Procedure Code (Act XIV of 1882) and such an injunction as the plaintiffs seek does not fall within these sections. Such an injunction as they desire can only be granted by the final lecree

made at the hearing of this suit: see sections 53, 54 and 56 of the Specific Relief Act (I of 1877). He also cited clause 13 of the Letters Patent, 1865, and sections 12 and 25 of the Civil Procedure Code (Act XIV of 1882).

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Davar for the plaintiffs in support of the rule cited Nusserwanji M. Panday v. Gordon. (1)

RUSSELL, J.:—The plaintiffs herein, Jairamdas Ganeshdas and another, sue the defendant Zamonlal Kissorilal for damages for the non-acceptance of one hundred bales of cotton and ask to restrain the defendant from proceeding with Suit No. 21205 of 1902 in the Bombay Small Causes Court. Paragraph 6 of the plaint herein sets out the nature of that suit. (His Lordship read the paragraph and continued:)

Mr. Inverarity for the defendant herein has raised an important question, viz., that this Court has no jurisdiction to restrain the defendant from carrying on his suit in the Small Cause Court. I take it to be an important question, for points of this kind are repeatedly raised in this Court and all questions involving jurisdiction are important.

The plaintiffs in their affidavit in support of the rule, which has not been replied to, state that they were induced by a threat on the defendant's part not to file this suit, and so the defendant was enabled to file his suit in the Small Cause Court first.

Mr. Inverarity's contention put shortly is this: that this injunction can only be granted by final decree in this suit and not on an interlocutory application. This depends on the effect of sections 53, 54 (e) and 56 (a) of the Specific Relief Act (I of 1877). (His Lordship read the sections (2) and continued:)

In the first place, it is to be observed that the framers of the Civil Procedure Code have apparently expressly refrained from putting temporary or interlocutory injunctions on the

^{(1) (1881) 6} Bom, 266.

⁽²⁾ Specific Relief Act (I of 1877), sections 53, 54 (e) and 56 (a) & (b): .

^{53.} Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court. They may be granted at any period of a suit, and are regulated by the Code of Civil Procedure.

A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit.

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same footing as they are put by the English Judicature Act, 1873 section 25, sub-clause 8. (His Lordship read the section.(1))

Section 53 of the Specific Relief Act (I of 1877) moreover says that temporary injunctions are to be regulated by the Civil Procedure Code: see Amir Dulhin v. Administrator-General of Bengal. (2) Sections 492 and 493 of the Civil Procedure Code, however, provide as follows. (His Lordship then read the sections. (3))

54. * * * * * * *

When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases:

- (e) Where the injunction is necessary to prevent a multiplicity of judicial proceedings.
 - 56. An injunction cannot be granted-
- (a) to stay a proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent multiplicity of suits;
- (b) to stay proceedings in a Court not subordinate to that from which the injunction is sought.
 - (1) English Judicature Act, 1873, section 25, clause 8:
- 25 (8). [So far as relevant.] An injunction may be granted by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just.
 - (2) (1895) 23 Cal. 351.
 - (3) Civil Procedure Code (XIV of 1832), sections 492, 493, paragraphs 1 and 2:
 - 492. If in any suit it is proved by affidavit or otherwise-
- (a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
- (b) that the defendant threatens or is about to remove or dispose of his property with intent to defeaud his creditors,

the Court may by order grant a perpetual injunction to restrain such act, or give such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, or refuse such injunction or other order.

493. In any suit for restraining the defendant from committing a breach of the peace or other injury, whether compensation be claimed in the suit or not, the plaintiff may at any time after the commencement of the suit, and either before or after judgment, apply to the Court for temperary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of like kind arising out of the same contract or relating to the same property or right.

The Court may by order grant such injunction on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit, or refuse the same, It is obvious that an application to restrain a suit in the Small Cause Court does not come within these provisions. I take it that expressio unius est exclusio alterius, and if the framers of the Civil Procedure Code had intended to put interlocutory applications for injunction on the same footing as they were under the Judicature Act, they would have done so. I must assume, therefore, that they deliberately intended to limit such applications to the matters enumerated in sections 492 and 493 of the Civil Procedure Code only. Moreover it is under the head of perpetual injunctions only in the Specific Relief Act that the present application comes, and as that can only be granted by the decree made at the hearing, this application must be refused.

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At the same time, it appears to me that the plaintiffs are not without another remedy. It would be a manifest injustice if they were. For their position is this. They are entitled by law to bring this suit in this Court, although it is within the jurisdiction of the Small Cause Court. Their object in doing so is, I am told, to enable them to get discovery and inspection which they cannot get in the Small Cause Court. If the defendant herein gets his decree in the Small Cause Court, the matter will be res judicata and the plaintiffs will be without any remedy. Now of course they might file a cross-suit in the Small Cause Court, which they do not wish and are not obliged to do. I am of opinion then that their proper course would be to apply to this Court to remove the defendant's suit from the Small Cause Court to this Court under clause 13 of the Letters Patent. The Extraordinary Jurisdiction of this Court is that which the Court exercises on special occasions and in a special manner: see Navivahoo v. Turner.(1) Clause 13 of the Letters Patent applies to the exercise of the Extraordinary Original Jurisdiction of the Court. The Extraordinary Jurisdiction of the High Court is derived from Regulation II of 1827, section 5, clause 2, the powers conferred by which upon the Sadar Diwani Adalat were by section 9 of 24 and 25 Vict., cap. 15, transferred to the High Court: see Mahadaji v. Sonu.(2) By section 6 of the

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Small Cause Courts Act (XV of 1882), the Small Cause Court shall be deemed to be under the superintendence of the High Court. (His Lordship read the section.(1))

Rule 62 of the High Court Rules enables me to exercise any part of the jurisdiction vested in the High Court on its Original Side. But as the point has not been argued I merely throw this out for the consideration of the parties to save them further costs; for it may be that Mr. Inverarity might convince me that an application, such as I have suggested, should be made to the High Court on its Appellate Side.

I must discharge this rule with costs. Order that the sum deposited by the plaintiffs before applying for the rule be returned to them or their Attorneys.

Rule discharged.

Attorneys for the plaintiffs—Messrs. Tyabji, Dayabhai and Company.

Attorneys for the defendant-Messrs. Malvi, Hiralal and Modu.

⁽¹⁾ Presidency Small Cause Courts Act (XV of 1892), section 6:

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Batty.

DATTAGIRI GURU SHANKARGIRI GOSAVI (OBIGINAL PLAINTIFF), APPELLANT, v. DATTATRAYA KRISHNA SINDE (OBIGINAL DEFEND-ANT), RESPONDENT.* 1902. August 21.

Limitation Act (XV of 1877), schedule II, article 134—Alienation of trust property by guru of a math for valuable consideration—Suit by his successor to recover possession—Trustae, alienation by a—Adverse possession—Limitation.

The guru or manager of a certain math, who, as trustee, held certain property belonging to the math, sold it for value to the defendant in 1871. In 1898 his successor sued to recover it, contending that the vendor had no power to alienate the trust property.

Held, that the suit was barred by limitation under article 134 of the Limitation Act (XV of 1877).

SECOND appeal from the decision of R. Knight, District Judge of Satara, confirming the decree of Rao Saheb G. A. Bhat, Subordinate Judge of Islampur.

The plaintiff was the guru (preceptor and manager) of a certain gosávi math situate in the village of Shivni in the Sátára District. He filed this suit in 1893 to recover from the defendant certain land, which he (plaintiff) alleged belonged to the math and had been improperly alienated by a previous guru of the math to the defendant's father. He contended that the alienation was invalid inasmuch as the land had been given to the math in charity and was inalienable.

It appeared that in the seventeenth century the village of Shivni had been granted by the then Government in inim to a certain gosávi (ascetic) named Ramchandragiri for the maintenance of a sadávart, (1) which was attached to the math. The village was to be held by the guru of the math for his life. On his death it passed to his chela (disciple), who became his successor. This grant was subsequently confirmed by the Peishwa's Government in 1791.

^{*} Lecond Appeal No. 643 of 1990.

(1) A place for the distribution of food and alms.

DATTAGIBI

In 1863 the Summary Settlement Act (Bombay Act II of 1863) was passed. No sanad under the Act in respect of the village in question was then issued.

In 1871 the village was divided between two disciples, viz., Shankargiri and Shivgiri, of a *guru* named Gulabgiri. They each took a moiety of the village.

In 1871 Shankargiri sold the land in suit which was situate in his moiety to the defendant's father, who thereupon entered into possession.

In April, 1897, a sanad of the village under the Summary Settlement Act (Bombay Act II of 1863) was issued. The material portion of the sanad was as follows:

It is hereby declared that the said village shall be continued for ever by the British Government under section 11 and section 16, clause B, of Act II of 1863 of the Bombay Legislative Council as the private property of the persons who from time to time shall be its lawful holders.

On the 24th August, 1897, Shankargiri died having appointed the plaintiff to be his disciple, and the plaintiff thereupon succeeded to Shankargiri's moiety of the village in which the land in question was situate. In 1898 he brought this suit to recover the land, contending that Shankargiri had no right to alienate it and that his alienation was not binding on the plaintiff.

The defendant answered that under the Summary Settlement Act (Bombay Act II of 1863) and the sanad issued under it in 1897, Shankargiri became the owner of the land; that he had enjoyed the land as owner and had sold it to the defendant's father; that even if the land was originally granted in charity, its character had been changed by the sanad of 1897.

The Subordinate Judge dismissed the suit.

On appeal by the plaintiff the Judge framed two issues, namely:

- 1. Whether it is competent to the Court to go behind the sanad and ascertain on what terms or for what purpose the land was originally granted?
 - 2. Whether the land is now alienable?

He found on the first issue in the negative and on the second in the affirmative, and confirmed the decree.

The plaintiff having preferred a second appeal, it came on for hearing before Jenkins, C.J., and Aston, J., on the 2nd October, 1902. After hearing argument the Court sent down the case for findings on the following issues:

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- 1. Whether at the date of the sale in 1871 the lands in suit were held by Shivgiri and Shankargiri (a) as heads of maths, and (b) as trustees thereof, or in what capacity were they held by them?
- 2. Is the right to recover the lands barred by the adverse possession of the defendant and his predecessor in title?

On the first issue the Subordinate Judge found that the lands in dispute were at the date of the sale in 1871 held by Shankargiri and Shivgiri as their private alienable property. His finding on the second issue was in the affirmative.

Against the above findings the plaintiff appealed to the District Judge, which he, however, confirmed.

Ratanlal R. Desai for the appellant (plaintiff):-The lower Courts have found on the strength of the sanad issued in 1897 and revenue records that, though the lands in dispute were once endowment property, they have been treated as private and alienable property since 1862; therefore they have held them to be private alienable property. But this view is erroneous. If the lands were once the property of the temple, they could not become private alienable property simply because the plaintiff's predecessors, the holders for the time being, allowed them to be treated by Government as private property. The principle laid down in Keech v. Sandford (1) applies. The sanad was issued under the Summary Settlement Act (Bombay Act II of 1863) in 1897. That Act merely provides for an agreement with the holders of lands for the time being. Though the holder cannot dispute the settlement made with Government, he is not debarred from showing the real nature of the property: sections 12 and 13 of the Act; Puju bin Kadan v. Malhari Rama (2); Ravji Raghunath v. Kazi Sayad Gulamudin(3); Sayad Ahmed v. Venkaji Subrav.(4) The lands being thus the property of the endowment, the alienation in favour of the defendant is void: Prosunno Kumari

^{(1) (1726) 1} W. and T. L. C. 693 (7 Ed.). (3) (1878) P. J. p. 179.

^{(2 (1864)} I Bom. H C. R. 171.

^{(4) (1885)} P. J. p. 75.

Debya v. Golab Chand Baboo(1); Konwar Doorganath v. Ram Chunder.(2)

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As to limitation, we contend that the plaintiff's claim is not time-barred. The cause of action accrued on the death of the plaintiff's guru Shankargiri on the 24th August, 1897, and the plaintiff filed the present suit in 1898, that is, within twelve years from the accrual of the cause of action: Jamal Saheb v. Murgaya Swami⁽³⁾; Venkatesh v. Timapa.⁽⁴⁾

Scott (Advocate General) (with Daji A. Khare and Krishnaji H. Kelkar) for the respondent (defendant):—This suit is barred by limitation. The defendants have been in adverse possession from the date of the purchase, that is, more than twelve years prior to the institution of the suit, and article 134, schedule II of the Limitation Act, applies. The point is covered by the ruling of the Privy Council in Gnansambanda Pandara Sannadhi v. Velu Pandaram. The law of succession and inheritance applies to math property: Malhar Sakharam v. Udegir. (6)

[Jenkins, C.J., referred to Collector of Dacca v. Jagat Chunder Goswami. (7)]

That case supports our contention. The present suit is a suit by a person claiming title under a trustee. The case is on all fours with Ramchandra v. Sheikh Mohidin^(S); see also the ruling of the Full Bench in Behari Lal v. Muhammad.⁽⁹⁾

[Jenkins, C. J., referred to President, &c., of the College of St. Mary Magdalen, Oxford v. The Attorney General (10) and Bobbelt v. The South Eastern Railway Company. (11)]

Desai in reply cited Jamal Saheb v. Murgaya Swami(8) and Venkatesh v. Timapa. (4)

JENKINS, C.J.: —The sole question on this appeal is whether the plaintiff's right to recover possession of the plaint lands is barred by limitation.

- (1) (1875) L. R. 2 I. A. 145.
- (2) (1 76) 2 Cal. 341.
- (8) (1885) 10 Bom. 34,
- (4) (1897) P. J. p. 146.
- (5) (1899) L. R. 27 I. A. 69.
- (6) (1881) P. J. p. 108.
- (7) (1901) 28 Cal. 608, 611.
- (8) (1899) 23 Bom. 614.
- (9) :1898) 20 All. 482.
- (10) (1857) 6 H. L. C. 189.

(11) (1882) 9 Q. B. D. 424,

The allegations in the plaint are that the village, of which the lands are a part, was granted in inim for maintaining a sadávart to a gosavi's math: that it is to be enjoyed by a guru of the math during his lifetime and on his death passes to his appointed disciple, who becomes the guru of the math: that the village has been divided between the two Inamdars, of whom Shankargiri, the guru of the plaintiff, enjoyed one-half: that Shankargiri appointed the plaintiff as his disciple and died on the 24th August, 1897, and that the plaintiff thereupon, as the appointed disciple, became owner of the one-half of the village which included the plaint land: and that Shankargiri had no right to make any tran fer binding on the plaintiff.

The defence is that the lands were enjoyed by Shankargiri as his private property: that it was sold by him to the defendant in 1871: and that in any event the plaintiff's claim is barred by limitation.

The case first came on appeal to this Court on the 2nd October, 1901, but it was then found impossible to proceed with it, as the District Judge had omitted to record findings on issues that were material, and so it was remanded for findings on the following issues:

- 1. Whether at the date of the sale in 1871 the lands in suit were held by Shivgiri and Shankargiri (a) as heads of the maths, and (b) as trustees thereof, or in what capacity were they held by them?
- 2. Is the right to recover the lands barred by the adverse possession of the defendant and his predecessor in title?

On these issues it has been found (a) that the lands in suit were, at the date of the sale in 1871, held by Shankargiri and Shivgiri as their private alienable property, and (b) that the right to recover the land is barred by the adverse possession of the defendant and his predecessor in title.

Mr. Desai for the appellant has attacked the first finding, and, in our opinion, there is considerable force in his arguments. The Advocate General, however, maintains that he is entitled to succeed on the plea of adverse possession, even without the other finding. We will, therefore, deal with the case on the hypothesis that the lands in suit were held by Shivgiri and Shankargiri as heads of the math and as trustees thereof.

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o.

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Now, in cases of this class one first has to see how the claim is framed, whether it is made by the plaintiff on his own account, or on behalf of the institution he represents, for that governs the question, which article of the Limitation Act should be applied. The Advocate General before us has principally relied on the recent Privy Council decision in Gnanasambanda v. Velu Pandaram,(1) where it was held that article 124 applied. the plaintiff sought to establish his right to the management of an endowment connected with a certain temple and to the possession of lands forming its endowment, the hereditary right of management having been conveyed away by two prior documents of sale. It is manifest, then, that in that suit the plaintiff really sought to establish his own right, and not the right of the endowment, and hence it was that their Lordships did not apply article 134. In this case the right of management does not come in question; all that is sought is the recovery of a piece of land, and we think we ought, under the circumstances, to treat the suit as one brought to vindicate the rights of the math. Therefore, as it seems to us, Gnanasamba's case (1) does not assist us, and we must look elsewhere for guidance.

Treating this, then, as a suit by one to recover for the math lands in relation to which he is its head and trustee, we start with the proposition that property given for the maintenance of a math is, as a general rule, inalienable in the absence of special circumstances: Prosunno Kumari Debya v. Golab Chand Baboo (2); Konwar v. Ram Chunder. (3) But it by no means follows from this that such property cannot be lost by the operation of the Statute of Limitations: President, &c., of the College of St. Mary Magdalen, Oxford, v. The Attorney-General (4) and Bobbett v. The South Eastern Railway Co. (5) The case made by the plaintiff is that the property under the original grant from the Peishwa was vested in the gurus for the time being in trust for the math, and that, notwithstanding the terms of the more recent sanads, it still is, on the principle enunciated

^{(1) (1899)} L. R. 27 I. A. 69; S. C.

²³ Mad. 271.

^{(2) (1875)} L. R. 2 I. A. 145.

^{(3) (1876) 2} Cal. 34.

^{(4) (1857) 6} H. L. C. 189.

^{(5) (1882) 9} Q. B. D. 424.

Behari Lal v. Muhammad.(3)

in Keech v. Sandford, (1) held on this trust. We will, for the sake of argument, assume this to be so. We have then here a suit to recover possession of immoveable property, conveyed in trust and afterwards purchased from the trustee for a valuable consideration. But this is the class of suit to which article 134 in the second schedule to the Limitation Act in terms relates, and the time thereby limited for such a suit is twelve years from the purchase. Here far more than twelve years had passed from the purchase at the institution of the suit, and during that period

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In further support of this conclusion we would also refer to the already cited case of St. Mary Magdalen, Oxford, v. The Attorney-General, (4) for though it is a decision on the English statute, still it contains many points of resemblance to the present, and furnishes us with the clearest exposition of the law applicable to cases of this class. We propose to refer to that case in some detail, as it probably is not within the reach of most mofussil Courts in this Presidency.

possession had been with the purchaser. We see no reason for not applying the provision of article 134 to this case, more especially when we find a warrant for this view in the judgment of Mr. Justice Gurudas Banerjee in *Nilmony* v. *Jagabandhu*, (2) and of a Full Bench decision of the Allahabad High Court in

On the division of the parish of St. Olave, Southwark, it has been provided by statute that all charities and donations that had been granted to, and for the benefit of, the parish of St. Olave, Southwark, should be divided between that parish and the parish of St. John, Horsleydown, in the following manner: that three-fifths should be for the sole use and benefit of St. Olave, and that out of the revenue of the other two-fifths there should be paid to the churchwardens of the parish of St. Olave the annual sum of £29 for the benefit of the poor of St. Olave, and the residue of the two-fifths was to be for the benefit of St. John's. It was further provided that the rector or senior churchwarden of each of the parishes should jointly collect the charities, donations, &c., and should and might, with the consent of the

^{(1) 1} W. & T. L. C., 7th Ed., p. 693.

^{(2) (1896) 23} Cal. 536.

^{(3) (1898) 20} All. 482.

^{(4) (1857) 6} H. L. C. 189.

DATTAGIRI o. DATTATRAYA. vestry of each parish, make leases of the lands, &c., so given for charitable purposes and should do, perform and execute all and every such acts and things relating to the management of the said charity in such manner as the churchwardens of St. Olave might have done before the division of the parishes and the passing of the Act. In pursuance of resolutions of the vestries, an agreement was made to lease a piece of land to the president and scholars of Magdalen College at a rent of £15 per annum secured by a rent-charge on the land.

To carry out this agreement, a fine sur conusance de droit was levied on the 3rd March, 1730, and a deed of feoffment was made on the same day between the rector, the two churchwardens and two of the principal inhabitants of the parish of St. lave of the first part, the rector, the churchwardens and two of the principal inhabitants of St. John's of the second part, and the president and scholars of St. Mary Magdalen of the third part, whereby, in consideration of a perpetual rent-charge of £15 per annum, there was granted to the president and scholars and their successors the land in question to hold the same to the president and scholars, their successors and assigns for ever.

On the 31st January, 1852, an information was filed by the Attorney-General at the relation of some and on behalf of all the inhabitants of the two parishes, praying, among other things, for possession of the land. The defendants, in addition to other defences, relied on the bar of limitation and in particular on sections 2, 24 and 25 of 3 & 4 Will. IV, c. 27, which provide as follows:

- 2. No person shall bring an action to recover any land but within twenty years next after the time at which the right to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to bring such action shall have first accrued to the person bringing the same.
- 24. No person claiming any land in equity shall bring any suit to recover the same but within the period during which by virtue of the provisions hereinbefore contained he might have brought an action to recover the same respectively if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity.
- 25. When any land shall be vested in a trustee upon any express trust, the right of the cestui que trust to bring a suit against the trustee or any person

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claiming through him to recover such land shall be deemed to have first accrued according to the meaning of this Act at, and not before, the time at which such land shall have been conveyed to a purchaser for a valuable consideration and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.

The section, it will be seen, corresponds more or less with our articles 154 and 144 and section 10 of the Limitation Act.

The Lord Chancellor, Lord Cranworth, in dealing with these facts says: "Though there certainly is not, as far as I am aware, any positive law which forbids the sale of charity lands, yet it is obvious that such a sale can very rarely be justified." So he had to deal with a position very similar to that which confronts us.

Then after expressing the inclination of his opinion to be that there were no circumstances showing the sale to have been expedient, he proceeds to consider the question whether the Statute of Limitation presents a bar, and in this connection he says: "Are charities within those two sections 24 and 25, or are they not? I have come to the conclusion that they are. These sections apply in terms to all trusts. Charities are trusts—a favoured sort of trust no doubt, but still a charity is a trust and nothing more. Lord St. Leonards remarked truly that charities. eo nomine, are not mentioned in the statute, and expressed his surprise that that omission had occurred; but that is not material. for trusts generally are mentioned, and that includes charitable trusts, unless they are expressly excepted, and there certainly is no such exception. The right is barred by section 24 unless in a case where section 25 prevents its operation; and in this case it could only prevent the operation of section 24 if the College had held the land on an express trust for the charity, which it certainly did not."

Then later, in answer to the argument that it made a difference that the Attorney General was a party, the Lord Chancellor says:

The Attorney General is only a part of the machinery by which the rights of others are sought to be enforced. He is no more a party claiming a right than, in an ordinary action at law, the attorney on the record is such a person. We must look at the real litigants in this case, and not at those by whose intervention the rights in disputes are endeavoured to be sustained.... The parties

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really seeking relief in this suit are the poor of the two parishes of St. Olave and St. John. I am clearly of opinion that they are a class of persons within the true intent and meaning of the interpretation of that phrase given in the first clause of the statute. Section 24 creates an equitable bar against any "person" asserting an equitable right to land; and in the interpretation clause we are told that the word "person" shall extend to a body politic, corporate or collegiate and to a class of creditors and other persons as well as an individual, and I am of opinion that the poor of the parish constitute a class of persons within the meaning of that interpretation clause. I think so because the second section enacts that no "person" shall bring an action to recover land but within twenty years next after the time at which the right to bring such action shall have first accrued, that is, adopting the interpretation in the first section, the poor of the parish shall not bring an action but within twenty years. This, therefore, would prevent the poor of the parish from bringing an action after the prescribed time. But here there is no question as to an action. This is a suit in equity by or on behalf of the poor of the parish. How does the statute apply to such a proceeding? Section 24 enacts that no person shall bring any suit in equity to recover any land but within the same period within which he might have brought an action at law, if his right had been a legal right. This section, therefore, bars the equitable, just as section 2 had barred the legal remedy. The right of the poor of the parish must be either a legal or an equitable right. There is no third class of rights known to our law, and by one or other of these sections the right, whether legal or equitable, is barred, unless indeed the right, treating it as equitable, is saved by the 25th section. The effect of this clause is to save the right of the cestui que trust, that is, in this case, the right of the poor, against the trustee, but not against purchasers for value from the trustees. Here the defendants were certainly not the trustees; they were purchasers for value from the trustees It was indeed argued at your Lordship's bar that the parish officers from whom the appellants purchased were not really the trustees, and, consequently, that the appellants were not purchasers for value within the true intent and meaning of the 25th section. But this is a mere fallacy. The parish officers were in fact the trustees; for they were the persons in legal possession, not for the benefit of themselves, but for the benefit of the charity; and they sold to the appellants for value, and made to them a good legal title. The defendants were thus clearly brought within the express words of section 25.

Lord Wensleydale delivered a judgment to the same effect and the plea of limitation was upheld.

Applying the same principles to this case, we hold that, treating the suit as one brought for and on behalf of the math, it is barred against the present defendant, inasmuch as he holds under a purchase for valuable consideration dated more than twelve years prior to the commencement of the suit, and it is

answer to the bar created by article 134 that the plaintiff succeeded to the office of guru within twelve years from the institution of the suit.

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The result is that, in our opinion, the decree of the lower Appellate Court must be confirmed with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Kt., Chief Justice, and Mr. Justice Aston.

NARAYAN MANJAYA AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, v. SHRI RAMCHANDRA DEVASTHAN, MORTESARS GANPAYA GOVIND SHETTI AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1903. February 18.

Limitation Act (XV of 1877), schedule II, articles 134 and 144-Temple property-Manager-Trustee-Lease by manager-Suit by subsequent manager to recover the property-Adverse possession.

In 1845, one Krishna Swami granted a mulgeni (perpetual) lease of the land in question to the defendants' grandfather, Hanmanna. The lower Appellate Court held that at the date of the grant Krishna Swami was manager of the temple Shri Ramchandra Devasthan, and that the land at that time belonged to the temple. In 1854 Krishna Swami's successor, the then manager of the temple, sued Hanmanna (the lessee) for enhanced rent, but the latter pleaded his lease and the suit was withdrawn. In 1885 the then manager brought a similar suit against the defendants with a similar result. In April, 1900, the present plaintiff, as manager of the temple, filed this suit to eject the defendants, alleging that they were yearly tenants and that he had given them notice to quit. He contended that his predecessor, Krishaa Swami, had no power to alienate the property of the temple.

Held, that the suit was barred by limitation. If the original lessor was not a trustee for the temple of the land in question, then the defendants had held by adverse possession, and the suit was barred under article 144 of the Limitation Act (XV of 1877). If the original lessor was a trustee, he had, as such, alienated the land for valuable consideration and the suit was barred by article 134 of the Limitation Act. The fact that there was a lease to the defendants, and not an absolute alienation, made no difference. A mulgeni lease is a purchase pro tanto of the interest thereby assured.

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SECOND appeal from the decision of Mr. E. H. Leggatt, District Judge of Kanara, amending the decree of Mr. E. F. Rego, Subordinate Judge of Kumta.

Suit in ejectment. The plaintiff, who was the manager of the temple of Shri Ramchandra Devasthan, sued to eject the defendants from certain land, alleging it to belong to the temple. He also claimed rent from 1897 to 1900.

The plaint alleged that the defendants were yearly tenants, and on 28th March, 1898, had been served with a notice to terminate the tenancy on the 10th April, 1899. It further stated that the defendants claimed to hold under a lease granted to their grandfather (Hanmanna) by a former manager of the temple, viz., one Krishna Swami, but the plaint of that the said lease was not for the benefit of the temple, and was not binding after the death of the parties to it.

The defendants pleaded that they held the land under a mulgeni (perpetual) lease granted to their grandfather (Hanmanna) by the then owner, Krishna Swami, who subsequently gave the land as an endowment to the temple subject to the lease.

It appeared that in 1854 the then manager of the temple had sued Hanmanna for enhanced rent, but the latter pleaded his lease and the manager withdrew his suit.

Again in 1885 the then manager sued the defendants for enhanced rent and they again set up the lease as a defence and the suit was withdrawn.

The Subordinate Judge dismissed the present suit. He held that the mulgeni lease was granted by Krishna Swami as owner of the land and not as manager, and that after the lease he gave the rents to the temple.

In appeal the Judge reversed the decision of the lower Court. He held that the land had belonged to the temple prior to the lease, and that it was as a trustee and manager of the temple that Krishna Swami had granted the *mulgeni* lease; that as manager he had no power to alienate except for a necessary purpose of which there was no evidence, or for the benefit of the temple; and that at most the lease would hold good only during his life.

As for the litigation of 1854 and 1885, he was of opinion that the fact that the then managers withdrew their suits would only have the effect of continuing the grant during their respective lives, and could not affect the right of the present plaintiff to sue for possession. It was not suggested that the present plaintiff had done anything to give the defendants a right to remain in possession during his life. The lower Appellate Court accordingly passed a decree for the plaintiff.

The defendants preferred a second appeal.

Nilkant A. Shiveshvar for the appellants (defendants):—The defendants have held the land since the mulgeni lease was granted in 18:5. In 1854 and 1885 they successfully asserted their right under the lease against the plaintiff's predecessors, and they have thus had adverse possession of these rights in the land for fifty-eight years. Their possession has not been in any way disturbed for twelve years, and they are now, therefore, entitled to remain in possession as mulgenidars: Budesab v. Hanmanta (1); Dattagiri v. Dattatraya (2); St. Mary Magdalen v. Attorney General (3); Attorney General v. Davey (4); Behari Lal v. Muhammad Muttakki. (5)

Mahadev B. Chaubal for the respondents (plaintiffs):—To make the lease granted to the defendant's grandfather by Krishna Swami binding on his successors there must be evidence that it was granted for the benefit of the temple. The Judge says that there is no proof in the case to show that it was granted for such a purpose. The finding arrived at by the Judge is a finding of fact.

The transactions in the cases relied on, and especially in the case of Da'tagiri v. Dattatraya, (2) were sales. The relation between the plaintiffs and the defendants in the present case is that of landlord and tenant. The possession of a tenant cannot be adverse to his landlord.

We contend that the lease is not binding on us because Krishna Swami had no power to alienate temple property except for 1903.

NABAYAN v. SHRI RAMCHAN-DRA.

^{(1) (1896) 21} Bom. 509.

^{(3) (1857) 6} H. L. C. 189.

 ^{(2) (1902) 4} Bom. L. R. 743, see ante p. 363.
 (4) (1859) 4 DeG. & J. 136
 (5) (1898) 20 All. 482.

NARAYAN v. SHRI RAMCHAN-DRA. a necessary purpose, of which there is no evidence: Vadapuratti v. Vallabh(1); Ramchandra v. Kashinath(3); Narayan v. Chintaman.(3)

Jenkins, C.J.:—The plaintiffs sue to recover possession of a piece of land and also rent, and they have been met with the plea that the land is held by the defendants under a *mulgeni* lease granted by Krishna Swami, and that all rent has been discharged.

It has, however, been held by the lower Appellate Court that the leased land belonged to the temple of which Krishna Swami was the manager, and that the lease is not now binding on the plaintiffs, the present managers. In so holding, the defendants' plea of limitation has been determined to be of no avail. Assuming, then, that the lease was invalid, the only question before us is whether the defendants' plea of limitation is sound.

The lease is dated 1845 and purports to create a mulgeni interest at a rent of 8 mooras of rice. In 1854 there was litigation regarding the rent of the leased land brought by the then manager against a predecessor of the defendant. The defendant in that litigation asserted the mulgeni character of the lease and in the end the suit was withdrawn.

Then in 1885 a further suit was brought. The mulgeni lease was again pleaded, and again the suit was withdrawn.

It is clear, then, that from 1854 the defendant and his predecessors have been in possession of the land in suit, and throughout that period have asserted to the knowledge of the temple managers their claims as mulgenidars under the lease of 1845, and have successfully resisted on that ground the manager's attempts to obtain enhanced rent. Why, then, should the present defendant be not entitled to invoke the aid of the Statute of Limitation? If the original lessor was not a trustee of the leased land for the temple, article 144 applies, with the result that there has been an adverse possession to the extent of the alienation contained in the mulgeni lease: Badesab v. Hammanta. (4)

It is urged, however, that there is a trust, and that this makes a difference. But it has been already held by this Bench in Dattagiri

^{(1) (1890) 13} Mad, 20.

^{(2) (1894) 19} Bom. 271.

^{(3) (1881) 5} Bom. 393.

^{(4) (1896) 21} Bom. 509.

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v. Dattatraya, (1) relying in part on the decision in Attorney General v. Magdalen College, (2) that where the head of a math, who holds math property as a trustee thereof, purports to alienate that math's property absolutely for valuable consideration, and the alienee holds under that title, a plea of limitation after the lapse of the prescribed period can be successfully urged.

Here no doubt we have a mulgeni lease, and not an absolute alienation, but in principle this involves no distinction, for even if article 134 be treated as the governing article, a mulgeni lease is a purchase pro tanto of the interest thereby assured: Attorney General v. Payne. (3) This last cited case and that of Attorney General v. Davey 4 furnish us with an instructive application of the decision in Attorney General v. Magdalen College(2) to a case where the lands had been leased and not aliened absolutely, and our application to the present case of our decision in Daltagiri's case(1) runs on parallel lines. In Attorney General v. Payne 3 an improvident lease was granted by a charitable corporation to a trustee for the master, and yet it was held that after twenty years' enjoyment under it the right of the Attorney General to question its validity was barred by the Statute of Limitation. Lord Romilly in his judgment, after referring to Attorney General v. Magdalen College, (2) says: "I compare that case with the present. and what is the difference? Here the alienation was a lease, but what difference can that possibly make? A lease is an alienation pro tanto.... I cannot distinguish this case from Attorney General v. Magdalen College,(2) and I think that as soon as the lease was granted the lessee held adversely to the rights of the charity to the extent of the alienation contained in the lease."

In Attorney General v. Davey⁽⁴⁾ it was held that the decision in Attorney General v. Magdalen College⁽²⁾ governed a case where charity land had not been aliened in fee, but had been held under a lease for five hundred years, granted by trustees at a rent which had been regularly paid. The Lord Chancellor, Lord Chelmsford, in delivering judgment, said: "Is there, then, any distinction between the present case and that of Magdalen College⁽²⁾?

^{(1) (1902) 4} Bom. L. R. 743, see ante p 363.

^{(3) (1859) 27} Benvan 168.

^{(2) (1857) 6} H. L. C. 189.

^{(4) (1859) 4} DeG. & J. 136.

NARAYAN v. Sheri RAMCHAN-DRA. Mr. Lloyd says that the lease was void, but that by the acceptance of rent a tenancy from year to year had been created. He was pressed to give an authority for the proposition, that possession taken under a lease of this kind has ever been dealt with in equity as a lease from year to year, and he has been unable to produce any such authority. I think that there has been adverse possession, and that the statute would run according to the decision in the House of Lords by which we are bound." Knight Bruce and Turner, L.J., agreed in holding that the case before them could not be distinguished from that of Maydalen College.(1)

In these cases adverse possession was regarded as running from the date of the lease, and it has been suggested before us that to apply such a doctrine in this country would be a dangerous innovation. It is, however, unnecessary to decide this point, for, even if, for the sake of argument, it be conceded that time should not run during the lifetime of the person who granted the lease, it clearly would run from his death, and starting from that point even sufficient time has elapsed to bar the suit either under the 144th or the 134th article. For these reasons we hold that the District Judge wrongly decided that the Statute of Limitation was not a bar to the claim for possession.

The District Judge's decree as to rent is, we think, also wrong. In the first place Rs. 54-3-0 has been paid into Court during the suit; then we think the items of Rs 10 and Rs. 4-8-0 for interest should have been disallowed, so that Rs. 18-10-0 will be awarded for past rent. No decree can be passed as to future rent. Appellants must get their costs throughout.

Decree reversed.

d (1857; 6 H. L. O. 189.

APPELLATE CIVIL

Before Mr. Justice Crowe and Mr. Justice Aston; and, on reference, before Mr. Justice Chandavarkar.

NARAYAN BHAGWAN GANDHI (OBIGINAL PLAINTIFF), APPELLANT, v. SHAMRAO LAXUMAN AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.**

1903. February 27.

Civil Procedure Code (Act XIV of 1882), section 43—Cause of action— Splitting of cause of action—Suit to recover exclusive possession of land— Suit to obtain a share by partition of land—Certificate of sale relied upon in both suits.

The p'aintiff, in execution of a decree obtained by him, purchased at a Courtsale the right, title and interest of his judgment-debtors, Rajaram and Sitaram, in certain lands; and on the 12th November, 1886, he obtained a sale certificate in respect of all the properties so purchased. In 1891 he brought a suit (No. 519 of 1891) against the heirs of Sitaram, then deceased, for possession of certain of the lands included in the sale certificate, of which they were in exclusive possession. and he obtained a decree. In the next year, 1892, he brought another suit (No. 518 of 1892) against the heirs of Rajaram, then deceased, and another person, for possession of other lands included in the sale certificate, of which they were in exclusive possession, and he again obtained a decree. In both the above suits he based his claim on the sale certificate showing his title as purchaser. The remainder of the lands included in the sale certificate were held by the heirs of Rajaram and Sitaram jointly with other members of the family who were coparceners with them, and in 1897 the plaintiff filed this suit to recover by partition the shares of the heirs of Rajaram and of Sitaram in these lands. basing his claim upon the sale certificate. The lower Courts rejected the claim on the preliminary ground that the suit was barred by the provisions of section 3 of the Civil Procedure Code (Act XIV of 1882).

Held, by Chandavarkar and Aston, JJ. (Crowe, J., dissenting), reversing the decree and remanding the case, that the suit was not barred by section 43. That section does not apply where the cause of action is different. The title on which the former suits were based was exclusive ownership, while that on which the present suit was based was joint ownership. A person who has succeeded in recovering one property under one title is not debarred from suing to recover another property under another title.

The cortificate of sale is not the title; it is merely the title-deed.

SECOND appeal from the decision of Ráo Bahádur Raghavendra Ramchandra Gangolli, Additional First Class Subordinate Judge

NARAYAN V. SHAMRAO. with Appellate Powers, at Thana, confirming the decree passed by Rao Saheb C. R. Karkare, Joint Subordinate Judge at Mahad. Suit to recover possession of land.

The plaintiff, Narayan Bhagwan Gandhi, obtained a decree against Rajaram Haibat and Sitaram Haibat in Suit No. 260 of 1878. In execution of that decree, he caused the right, title and interest of Rajaram Haibat and Sitaram Haibat in certain lands situate in the villages of Shiravali, Vasape, Ravatale and Vinhere to be sold, and at the sale he himself became the purchaser. The sales took place on the 11th, 22nd, 27th and 29th March, 1886, and the 8th, 9th and 10th September, 1886, and in respect of all the lands so sold one certificate of sale, dated the 12th November, 1886, was granted to the plaintiff.

In 1891, the plaintiff sued (No. 519 of 1891) Vinayak (present defendant No. 5), the son and heir of Sitaram Haibat, then deceased, for possession of some of the lands so purchased as above stated and obtained a decree. These lands were situated in the village of Ravatale and were in the exclusive possession of Vinayak.

In the following year, viz. 1892, the plaintiff brought a suit (No. 518 of 1892) against the sons and heirs of Rajaram Haibat (viz., the present defendants 4, 9, 10 and 12) and against another person (defendant 6) to obtain possession of other lands included in his above purchase, and he obtained a decree. These lands were situate in the village of Vasape and were in the exclusive possession of the defendants to that suit.

In both the above suits the plaintiff relied on the certificate of sale dated the 12th November, 1886.

The remaining lands of those purchased by the plaintiff at the execution sale in 1886 and included in the certificate of sale of 12th November, 1886, were held by the heirs of Rajaram Haibat and Sitaram Haibat jointly with other members of the family who were copareeners with them, and the plaintiff now filed this suit (No. 502 of 1897) to recover the shares of the heirs of Rajaram and Sitaram in these lands. In this suit he made all the copareeners interested in the lands defendants, and he prayed for partition and possession of the shares, and based his claim upon the certificate of sale showing his title as purchaser.

Some of the defendants filed written statements which are not material to this report. The others did not appear.

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The Subordinate Judge suo motu framed an issue as to whether the present suit was barred by sections 42 and 43 of the Civil Procedure Code. He found this issue in the affirmative and dismissed the suit. In his judgment he said:

No reasons have been shown why plaintiff did not ask for relief in respect of these lands in the former suits. Plaintiff ought to have sued for those lands in the previous litigation as the cause of action was the same. It is well established that the law does not encourage multiplicity of suits. The same principle is laid down in sections 42 and 43 of the Civil Procedure Code. In my opinion the present suit is barred by previous litigations under the aforesaid sections. Plaintiff has omitted to sue for the lands in question in previous suits, and so he must take the consequences.

Against this decree plaintiff appealed. The lower Appellate Court confirmed the decree on the following grounds:

A party is bound to bring forward his whole case in respect of the matter in litigation and open to him upon the points for decision in the suit: Udaiya Tewar v. Katama Nachiyar (2 Mad. H. C. 131).

The correct test when a second suit is brought for something omitted to be sued for in a previous suit is whether the claim in the new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit: Buzloor Raheem v. Shumsoonissa Begum; Judoonath Bose v. Shumsoonissa Begum (8 W. R. P. C. 3; 11 Moore's I. A. 551). It is a well established rule of law that a plaintiff is bound to include in his plaint all the grounds upon which his suit is based. A second suit upon a different ground which existed before the commencement of the first suit would not be allowed, as it would be splitting the cause of action: Abhiram Doss v. Shriram Doss (3 Beng. L. R. 421, s. c. 12 W. R. 336).

A plaintiff's cause of action consists of every fact which it would be necessary for him to prove, if traversed, in order to support his right to the judgment of the Court: Read v. Brown (L. R. 22 Q. B. D. 128).

The term "cause of action" includes all the reliefs covered by the facts, on the strength of which a plaintiff comes into Court, and therefore if he omits to ask for any of them he shall not be allowed to do so in a subsequent suit: per Stuart, C.J., in Sarsuti v. Kunj Behari Lal (I. L. R. 5 All. 345 at p. 359); vide also Nanoo Sing Mandu v. Anand Sing Mandu (I. L. R. 12 Cal. 291); Andi v. Thatha (I. L. R. 10 Mad. 347); Ukha v. Daya (I. L. R. 7 Bom. 182).

A second suit may be brought only where some property was not available for partition when the previous suit was instituted: Balkrishna Vithal v. Harishankar (8 Bom. H. C. (A. C. J.) 64), followed in Narayan Bapuji v. Pandurang Ramchandra (12 Bom. H. C. 148 at p. 149).

Such is not the case in the present suit. On the authorities cited above and the facts of the case I think the learned Subordinate Judge was right in

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The plaintiff appealed to the High Court.

The case was heard by a Division Bench (Crowe and Aston, JJ.).

P. P. Khare for the appellant (plaintiff).

M. V. Bhat for respondent 5; G. B. Rele for respondents 4 and 5.

CROWE, J.:—The only question to be determined in this appeal is whether the present suit is barred by the provisions of sections 42 and 43 of the Civil Procedure Code.

The plaintiff sues on a certificate of sale dated the 12th November, 1886, under which he purchased the right title and interest of Rajaram and Sitaram Haibat in certain khoti and dhara lands situate in the villages of Shiravali, Vasape, Ravatale and Vinhere. Exhibits 89 and 90 are the certified copies of the decrees passed in two suits—No. 518 of 1892 brought by plaintiff for the possession of certain lands situate in Vasape against defendants 4, 9, 10, 11 in the present suit, and No. 519 of 1891 for the possession of the khoti share of the village Ravatale against defendant 5 in the present suit. The present suit is to recover separate possession by partition of a one-third share of the lands situate in the villages of Shiravali, Vasape, Ravatale and Vinhere mentioned in the sale certificate, together with mesne profits and costs. The cause of action is the same as that in the previous suits, namely, the right to possession under the certificate of sale.

Section 42 provides that every suit shall as far as practicable be so framed as to afford ground for a final decision upon the subjects in dispute and so as to prevent further litigation concerning them. The object of this section is to give effect to the maxim Interest reipublicae ut sit finis litium. Section 43 lays down that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. A plaintiff is not entitled to split up an entire cause of action so as to bring distinct suits in respect of distinct parts of the same cause of action. If a plaintiff omit to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not

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afterwards be allowed to sue in respect of the portion so omitted or relinquished. Both suits have been based on the same cause of action. It was open to plaintiff to ask for possession of the property now claimed in the previous suits. The cause of action does not vary, as urged by Mr. Khare, with the relief claimed. The observations of Stuart, C.J., in Sarsuti v. Kunj Behari Lal⁽¹⁾ on this point may be cited in this connection. He says:

I may point out what appears to me to be a misapprehension of the law by which the term "relief" is confounded with the larger and more comprehensive expression "cause of action." Neither in section 7 of Act VIII of 1859, nor in the corresponding section (section 43) of Act X of 1877, is the word "relief" or any single term corresponding to it to be found. On the contrary, it is "the whole of the claim arising out of the cause of action" that must be included in the suit, and the term "relief," to my mind, ought to be understood as synonymous with the words "any portion of the claim," which are to be found both in section 7 of Act VIII of 1859 and section 43 of Act X of 1877. The word "relief," at least as used in this country, is not a term of exact or precise technicality, but simply means the remedy which a Court of justice may afford in regard to some actual or apprehended wrong or injury, such remedy being large or small as the case may be. But it is not synonymous with "cause of action," that term including all the reliefs covered by the facts, on the strength of which a plaintiff comes into Court, and therefore if he omits to ask for any of them, he does so under the sanction of section 7 or section 43.

Nothing has supervened, as far as the defendants in the former litigations are concerned, since those suits were filed, to give a new cause of action. The property now claimed was available for partition when the previous suits were brought.

In the case of Brunsden v. Humphry, endied on by the pleader for the appellant, it was held that damage to goods and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights and give rise to distinct causes of action. It was there laid down that when the question arises as to whether the cause of action in two suits is the same, one of the tests is whether the same evidence would support both the suits; if it would, the cause of action is the same in both suits. Both in this suit and the previous litigations plaintiff has relied on the title as evidenced by the certificate of sale. He may be entitled to more than one

NARAYAN v. SHAMBAO. remedy in respect of the same cause of action, and he may sue for all or any of his remedies; but if he omits (without leave of a Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

It was contended that the present suit relates to partition of joint property in which persons not interested in the previous suits are interested. But the fact that other parties are made defendants does not relieve plaintiff from the necessity of suing the former defendants at one and the same time for all the reliefs to which he was entitled under the same cause of action. One of such reliefs was partition of the share of the properties now claimed. I think the lower Courts have taken a correct view of the case, and I would affirm the decree of the lower Appellate Court with costs, and direct that this appeal be dismissed with all costs.

ASTON, J.:—Under the plaintiff's purchase at a Court sale which lasted over several days, the plaintiff acquired the right, title and interest of the four sons of Rajaram Haibat and of the son of Sitaram Haibat in the properties specified in the sale certificate, as sold to him at the Court's sale.

The sale certificate does not state whether the sale was of a divided or undivided share in respect of any of the properties specified. The plaintiff rests his title upon the purchase aforesaid, but his cause of action in any suit to recover on such title, and the frame of his suit or suits, would depend to a great extent upon the nature of the interest acquired by the purchase and upon the conduct subsequent to the Court sale of the persons whose interests were sold, and upon possession, if any, of third persons.

From the decrees in Suits 518 of 1892 and 519 of 1891, it appears that in Suit 519 of 1891 plaintiff sued Vinayak, son of Sitaram Haibat, for possession of certain specified *khoti* land in Ravatale in possession of Vinayak, alleging that he had become owner of the said specified land, and that Vinayak wrongfully retained possession after demand. In Suit 518 of 1892 he sued the four sons of Rajaram Haibat, to whom were subsequently added Vinayak Sitaram and Vaman Mahadev, for possession of other specified land in possession of the four sons of Rajaram,

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alleging that they wrongfully retained possession after the Court sale aforesaid, after demand. In each of these two suits he obtained a decree for possession of the lands he sued for, and in neither of these two suits, as summarised in the decrees, is there any indication that the property comprised in either suit was joint undivided property.

In the present case the plaintiff sues to recover on partition the shares of the sons of Rajaram and Sitaram Haibat aforesaid in other property comprised in his sale certificate, but described in the plaint as undivided property. He has joined as defendants fifteen persons including the sons of Rajaram and Sitaram Haibat and all other coparceners, alleging that on demand he was refused possession of the share to which he became entitled by purchase at the Court sale.

"Title," cause of action," and "relief" may be inter-dependent, but are not synonymous terms. For instance, where a plaintiff had purchased two houses under the same sale deed and was dispossessed of both on different dates, and thereafter brought consecutive suits, it was held in Riayatullah v. Nasir (1) that although the plaintiff's title to both the houses rested on the title acquired by him under one and the same sale deed, yet his ouster on two different occasions from the two houses gave rise to two separate causes of action, which he was not bound to join in the earlier suit, there being nothing in the Civil Procedure Code to compel him to do so.

Again, "the whole cause of action includes every fact essential to the maintenance of the action, and each of these facts separately is but a part of the cause of action": DeSouza v. Coles. If A and B and C each sell me on the same day a different house, I may have no cause of action against A though A's title may be complete and be acquired by my purchase, for A may do all the law requires to put me in possession. I may have a cause of action against B though B may have no title in the house he pretends to sell to me. The frame of my suit to recover the property sold by C may be quite different if I have reason to believe that C has only a limited interest in the house he has affected to sell to me. So far as sections 42, 43 of the Civil

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The remedy sought in the present suit could not have been sought in either of the earlier suits which related to other property. The claim in the present case is entirely distinct from the two earlier ones, and is based upon a separate cause of action though the plaintiff rests his title upon one and the same Court sale. I can find no support in sections 42, 43 of the Civil Procedure Code, or in the cases cited at the hearing, for the contention of the respondent's pleader, Mr. Bhat, that the plaintiff by bringing the two earlier suits aforementioned has split up his cause of action with respect to the subject matter of the present suit. That contention was based entirely upon the assumption that the plaint property in the two earlier suits, Nos. 519 of 1891 and 518 of 1892, was an undivided share in joint property with which the present suit is concerned—an assumption contradicted by the record.

A suit on exclusive title for possession of specified land set out in a plaint as in possession of a defendant and a suit for recovery, on partition, of a share in joint and different property set out in a plaint filed against the same defendant and others, constitute in my opinion suits of a different nature based upon separate causes of action.

I would reverse the decree of the Court below and remand the case for a decision on the merits.

Owing to the above difference of opinion, the case was referred to Mr. Justice Chandavarkar, under section 575 of the Civil Procedure Code (Act XIV of 1882).

P. P. Khare for the appellant (plaintiff):—The lands sought to be recovered in the previous suits were in the exclusive possession of the defendants to those suits. Those were suits in ejectment, while the present suit is for a partition of the joint family property impleading all the coparceners, the cause of action being founded upon plaintiff's title as a joint owner. These were two different causes of action. The term "cause of

action" is to be understood in each suit to mean cause of action alleged by the plaintiff in his plaint. The subject-matter and the parties in the two litigations were quite different. I rely on Brunsden v. Humphrey. (1)

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M. V. Bhat for respondent 5 (defendant 5):—The basis of the plaintiff's claim in this suit is the same as that in the two former suits, viz., the certificate of sale dated the 12th November, 1886, which conveyed to him the right, title and interest of the judgment-debtors, Rajaram and Sitaram, in all the property sold.

The plaintiff ought to have brought one suit for possession by partition of the lands covered by the certificate: Narayan v. Pandurang⁽²⁾; Ukha v. Daya⁽³⁾; Rangayya v. Nanjappa⁽⁴⁾; Abhiram Doss v. Sriram Doss.⁽⁵⁾ To hold that the words "cause of action" in section 43 of the Civil Procedure Code (Act XIV of 1882) mean the cause of action which the plaintiff chooses to put forward on each occasion is to frustrate the very object of the section.

G. B. Rele for respondents 4 and 5 (defendants 4 and 5).

CHANDAVARKAR, J.:—This is a suit brought by the plaintiff Narayan Bhagwan claiming a one-third share in the properties in dispute. The plaintiff's allegation is that those lands with certain other lands were purchased by him at a Court sale in execution of a decree obtained by him against (1) Rajaram, deceased, by his sons and heirs Pandurang, Shankar, Balkrishna and Shivram, and (2) Sitaram Haibat, deceased, brother of Rajaram, by his son and heir Vinayak. The sale certificate in respect of all the properties so purchased by the plaintiff at the Court sale is dated the 12th of November, 1886.

After the Court purchase the plaintiff brought two suits, Nos. 519 of 1891 and 518 of 1892, to recover exclusive possession of some of the properties included in the sale certificate. Those were properties other than the lands now in dispute and he

^{(1) (1884) 14} Q, B. D. 141.

^{(3) (1882) 7} Bom. 182.

^{(2) (1875) 12} B. H. C. R. (A. C. J.) 148. (4) (1901) 24 Mad. 491. (5) (1869) 3 Beng. L. R. (A. C. J.) 365 at p. 421.

NABAYAN v. SHAMRAO. alleged that he was entitled to them as absolute owner. Suit No. 519 of 1891 was brought against one Vinayak by the plaintiff, while Suit No. 518 of 1892 was brought by him against all his judgment-debtors whose right, title and interest he had purchased and also against one Wamanji Mahadev, who is defendant No. 6 in the present suit. The plaintiff succeeded in recovering exclusive possession of the lands in respect of which those two suits had been brought.

The present suit is brought in respect of lands other than those to which the two previous suits related and in it the plaintiff seeks to recover a one-third share by partition in those lands. He alleges in his plaint that the defendants whose right, title and interest in these lands he purchased at the Court sale owned them jointly with the other defendants and that he is entitled to recover his share by partition. Both the Courts below have rejected his claim without going into evidence on the preliminary ground that under section 43 of the Civil Procedure Code (Act XIV of 1882) he is debarred from maintaining the present suit, because in the two previous suits he omitted to include the property for which he now sues.

I am of opinion that both the Courts below have wrongly applied section 43 to the plaintiff's present claim. Section 43 only applies where the cause of action is the same in the two The cause of action alleged by the plaintiff in the two previous suits was founded upon his title as absolute and exclusive owner of the properties to recover which those suits were brought. He sued the defendants in those suits as trespassers, and his claim in both of them was one in ejectment. In the present suit the property is different and the cause of action alleged in the plaint is founded upon the plaintiff's title as a joint owner with the defendants, other than those whose right, title and interest he purchased at the Court sale. It seems to me clear, therefore, that the cause of action in the present suit is quite different from the cause of action of the two previous suits and section 43 can have no application to the present case. To borrow the language of their Lordships of the Privy Council in Amanat Bibi v. Imdad Husain(1) the plaintiff's "present claim certainly did not arise out

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of the cause of action which was the foundation of the former suit." The title on which the present claim is based, viz., that of joint ownership, is different from the title on which the two previous suits were brought, viz., that of exclusive ownership. I think the present suit falls within the principle of law enunciated in Konnerrao v. Gurrao(1) by Melvill, J., "that a person who has failed to recover one property under one title can sue to recover another property under a different title." A fortiori, a person who has succeeded in recovering one property under one title is not debarred from suing to recover another property under another title.

It is urged, however, that the plaintiff's cause of action in the present suit is identical with that on which the two previous suits were founded, because, it is said, the properties now in dispute are part of those specified in his certificate of sale. It is contended that the defendant's title, whatever it is, flows from one source, viz, his certificate of sale dated the 12th November, 1886. I am of opinion that the certificate of sale is not the plaintiff's title: it is merely his title-deed. Because the same deed related to several properties, it does not necessarily follow that the title or the cause of action as to all of them must be the same. If in fact the plaintiff were entitled to the properties now in dispute on the same title on which he recovered the properties in the two previous suits, section 43 might apply, but that is the case of neither side.

Upon these grounds, I concur with Mr. Justice Aston's view of the law and reverse the decrees of the Courts below, and remand this case for a decision on merits. Costs to abide the result.

Decree reversed. Case remanded.

(1) (1881) 5 Bom. 589.

APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Chandavarkar.

1903. March 4. NATHU PIRAJI MARWADI (OBIGINAL PLAINTIFF), APPELLANT, v. BALWANTRAO BIN YESHWANTRAO AND ANOTHER (OBIGINAL DEFENDANTS), RESPONDENTS.*

Minor-Guardian—Adopted son—Sale by adoptive mother—Suit by sm to set aside sale—Purchase money paid by vendee to mother not recoverable from the son.

A Hindu mother, while her adopted son was a minor and had a guardian of property appointed to him by the Court, alienated some of the minor's property, treating it as her own. The adopted son, on attaining his majority, sued to set aside the sale.

Held, that the mother had no power to alienate the property and that the sale should be set aside.

Held, also, that although the purchase money had been applied by the mother in payment of debts for which the plaintiff was liable and the plaintiff had thereby benefited, yet the defendant was not entitled to recover the purchase money from the plaintiff. The debts had been paid not as the plaintiff's debts, but as the debts of the mother who claimed adversely to her son.

SECOND appeal from the decision of T. D. Fry, District Judge of Násik, reversing the decree passed by Khán Sáheb P. J. Talyarkhan, Joint Subordinate Judge of Násik.

Suit by an adopted son to recover land sold during his minority by his adoptive mother.

The land in question originally belonged to one Piraji Marwadi, who died in 1883. After his death his widow Gangabai adopted the plaintiff (Nathu), who, was then a minor. She continued in possession and management of the property and she filed suits in the name of the plaintiff, but in 1885, in consequence of certain disputes, the plaintiff's natural brother Suklal Khemchand obtained from the District Court a certificate of guardianship and administration to the person and property of the plaintiff. Suklal, however, did not obtain possession of the property, which remained with Gangabai. She subsequently began to deal with it as her own. On the 29th January, 1887, she sold the land in suit to the defendant for Rs. 400, conveying it as her own and not as that of the minor plaintiff. Of the Rs. 400 she applied

Rs. 200 in satisfying a decree against the estate of her deceased husband Piraji, Rs. 150 in defraying the funeral expenses of one Jethi, her husband's sister-in-law, and the remaining Rs. 50 were spent on her own maintenance.

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Gangabai died in 1888. Plaintiff attained his majority in March, 1894, and on the 17th March, 1897, he filed this suit to recover the land from the defendant, contending that Gangabai had no right to sell it.

The defendant pleaded, inter alia, that the sale to him was bond fide and for valuable consideration and that the plaintiff was bound by it. He alleged that he had spent Rs. 1,000 or Rs. 1,500 in improving the land.

The Court of first instance held that the sale by Gangabai was not binding on the plaintiff and it passed a decree that the plaintiff should recover possession of the land on paying the defendant Rs. 400. This sum was arrived at by allowing Rs. 200 which were spent in satisfying the decree against Piraji's estate and by estimating the value of the improvements made by the defendant at Rs. 200.

On appeal the District Judge held that Gangabai was entitled to sell the property in order to meet the expenses she had incurred. He accordingly reversed the decree of the lower Court and dismissed the suit with costs.

The plaintiff appealed to the High Court.

Scott (Advocate General) (with him R. R. Desai) for appellant (plaintiff):—At the date of the sale by Gangabai, the minor had a certificated guardian appointed by the Court. Gangabai was therefore a mere stranger. There is no case in which a sale by a stranger in possession of a minor's property has been upheld as one by a de facto guardian when a certificated guardian was in existence. Gangabai had no title whatever and could give none to the defendant: Abhassi Begum v. Moharanee Rajroop⁽¹⁾; Court of Wards v. Kupulmun⁽²⁾; Debi Dutt v. Subodra.⁽³⁾

An alienation even by a guardian appointed under the old Guardians and Wards Act (XX of 1864) is void, and under the

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present Act (VIII of 1890) an alienation by a guardian without the sanction of the Court is also null and void: see Lala Hurro Prosad v. Basaruth Ali¹⁾; Dattaram v. Gangaram⁽²⁾; Choksi Motilal v. Mansang ³⁾; Chandrabhat v. Sangapa.⁽⁴⁾

There is no equity regarding repayment of the consideration money, as the sale was absolutely void.

Branson (with him D. A. Khare) for the respondents (defendants):-It is not the case that where there is a certificated guardian a de facto guardian cannot act at all : see Honana v. Mhalpai. (5) The restrictions imposed by the Guardians and Wards Act (VIII of 1890) do not apply to an uncertificated It may be that an uncertificated guardian cannot give a perfect title; but where the minor has benefited by an alienation he cannot set it aside without paying back the purchase money. Counsel referred to Vishnu v. Ramchandra(6); Nathuram v. Shoma(7); Lala Hurro Prosad v. Basaruth Ali(1); Abhassi Begum v. Moharanee Rajroop (8); Manishankar v. Bai Muli(9); Girraj v. Kazi Hamil(10); Sreemutty Ahfutoonnissa v. Goluck Chunder(11); Gunga Pershad v. Phool Singh(12); Anpuranabai v. Lurgapa (13); Nottingham Permanent Benefit Building Society v. Thurstan (14); Til Koer v. Roy Anand Kishore (15); Guthrie v. Abool Mozuffer.(16)

CHANDAVARKAR, J.:—We think that the lower Appellate Court has taken an erroneous view of the law in rejecting the plaintiff's claim on the ground that the defendant derived his title during the plaintiff's minority from the mother of the latter acting as the *de facto* guardian of the minor. The sale-deed purports to deal with the property as the mother's and there is no mention whatever in it of the minor. The minor must, therefore, be taken to have been completely ignored and that at

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(1) (1898) 25 Cal. 909.
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^{(2) (189°) 23} Bom. 287 at p. 290.

^{(3) (1895)} P. J. 5.

^{(4) (1875)} P. J. 312.

^{(5) (7890) 15} Bon. 259.

^{(6) (1883) 11} Bom. 130.

^{(7) (1890) 14} Bom. 562.

^{(8) (1878) 4} Cal. 33.

^{(9) (1888) 12} Bom. 686.

^{(10) (18°6) 9} All. 340.

^{(11) (1874) 22} Cal. W. R. 77.

^{(12) (1868) 10} Cal. W. R. 106.

^{(13) (1894) 20} Bom. 150.

^{(14) (1903)} A. C. 6.

^{(15) (1882) 10} Cal. L. R. 547.

^{(16) (1871) 14} M. I. A. 53.

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a time when the mother was not the guardian of the minor's property, which was then vested in the Court under Bombay Act XX of 1864, and the Court had appointed one Suklal as guardian and administrator of it. In selling the property to the defendant-the plaintiff's mother acted adversely to the minor and her act could not bind him. The sale, therefore, in favour of the defendant must be set aside and the plaintiff is entitled to recover the property.

But it is urged that the plaintiff cannot recover it without paying to the defendant the purchase money which went to satisfy debts binding on the minor. Assuming that it did, and that the minor benefited from it, we see no equity in favour of the defendant which entitles him to payment by the plaintiff of moneys which he had paid to the plaintiff's mother, not as his guardian, but as acting and purporting to act on her own behalf adversely to the minor. As held by the Privy Council in Ram Tuhul Sing v. Biseswar Lall Sahoo, (1) "it is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit, there must be an obligation, express or implied, to repay. settled that there is no such obligation in the case of a voluntary payment by Δ of B's debt. Still less will the action lie when the money has been paid, as here, against the will of the party for whose use it is supposed to have been paid."

In the present case the defendant paid the debts of the plaintiff, not as the plaintiff's debts or for the plaintiff, but as debts binding on his mother. The payment cannot, therefore, come under section 70 of the Indian Contract Act (IX of 1872), because it was not made for the plaintiff. It must under these circumstances be held to have been a purely voluntary payment and the remarks of the Calcutta High Court in Abhassi Begum v. Moharance Rajroop Koonwar⁽²⁾ apply to the facts of this case.

We must, therefore, reverse the decree of the Court below and award the claim against respondent No. 1 with costs on him.

Decree reversed.

INSOLVENCY JURISDICTION.

1903. Feb. 13 and 20, and March 6. Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

IN RE VALLABHDAS JAIRAM, KHIMJI JAIRAM AND BHANJI JAIRAM, Insolvents.**

Insolvent Act (Stat. 11 & 12 Vict., c. 21), sections 47 and 50—Offence under section 50 a criminal offence—Charge, &c., must be framed to sustain conviction and sentence—opposing creditor—Grounds of opposition should be stated in clear terms—Practice—Procedure.

Insolvents were found guilty under section 50 of the Indian Insolvent Act of wilfully preventing or purposely withholding the production of certain papers relating to their affairs and sentenced to three months' imprisonment.

Held, that the proceedings, so far as they resulted in imprisonment, amounted to a criminal case.

Held, further, (following Ex parte Van Sandau⁽¹⁾) that "in all criminal cases it is necessary that there should be a charge, a finding and a conviction, as a foundation for the sentence": and that as there was no charge, the order for imprisonment was wrongly made.

Section 47 of the Insolvent Act provides the machinery by which the grounds of opposition to a debtor's discharge may be inquired into and precisely defined before the hearing.

APPEAL against the finding and order of Russell, J., Commissioner of the Insolvent Debtors' Court, dated 4th February, 1903, who sentenced two of the insolvents to imprisonment.

Prior to their insolvency, the three insolvents, who were brothers, resided and carried on business as cloth merchants in Bombay, under the firm of Vallabhdas Jairam. Their native place was Bet in the Baroda territory, where a fourth brother, viz., Dhanji Jairam, resided and carried on a separate business of money-lending.

The three insolvents having filed their petition in October, 1901, one of their creditors (Naranji Parmanand) filed the following grounds of opposition to their discharge:

- 1. That the insolvents have concealed their books of account.
- 2. That the insolvents have made fraudulent and false entries in such books as they have produced.
 - 3. That the insolvents have kept false books of account.

* Appeal No. 1261; Insolvency No. 341 of 1901.
(1) (1844) I Phillips 445, 457.

- 4. That the insolvents have contracted debts fraudulently and by means of false pretences.
 - 5. That the insolvents have concealed their property.
- 6. That the insolvents have recklessly traded beyond their means and their debts so greatly exceed their means of providing for the payment thereof during the time when the same were in the course of being contracted, reference being had to their actual and expected property, as to show gross misconduct on the part of the insolvents contracting the same.
- 7. That the insolvents have fraudulently, and with the intent of diminishing the sum to be divided amongst their creditors, made away with and concealed their property.
- 8. That the insolvents have fraudulently and with the intention of defeating their creditors sent away large sums of money out of British India.
 - 9. That the schedule of the insolvents is false and fictitious.

Other opposing creditors, viz., the Trustees of the Khambalia Sanskrit Pathashala, filed grounds of opposition as follows:

- 1. That the insolvents have fraudulently and with intent to conceal the state of their affairs purposely withheld the production of their books of account relating to their affairs as are subject to investigation under the Insolvent Act.
- 2. That the insolvents have fraudulently with the intent to conceal the state of their affairs kept and caused to be kept false books and made false entries in and withheld entries from their books of account.
- 3. That the insolvents have fraudulently with intent of decreasing the sum to be divided among their creditors made away with and concealed part of their property.
- 4. That the insolvents have contracted debts fraudulently and by means of false pretences and without having any reasonable or probable expectation at the time when contracted of paying the same.
- 5. That the insolvents' whole debts so greatly exceeded their means of providing for the payment thereof during the time when the same were in the course of being contracted, reference being had to their actual and expected property, as to show gross misconduct in contracting the same.
 - 6. This schedule of the insolvents is false and fictitious.

The insolvents' petition came for hearing before the Commissioner on the 21st January, 1903, and following days. From the cross-examination of the insolvents it appeared that they had had for fifteen years an account with their brother Dhanji at Bet; that they had advanced to him large sums of money from time to time and was entered in their schedule as a debtor for Rs. 98,000. It appeared that many letters had passed between the insolvents and Dhanji. Counsel for the opposing creditors called for these letters, but they were not forthcoming. In his

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VALLABHDAS, IN RE. cross-examination Vallabhdas said that he received many letters from Dhanji, but did not know where they were; that he had deposited his "whole file of letters" with the Official Assignee, and that many of Dhanji's letters were in the Official Assignee's office.

He further stated that neither he nor his brothers had any books or papers besides those lodged with the Official Assignee.

On the 4th February, 1903, the Commissioner granted Khimji Jairam his discharge save as to certain specified debts, but as to the other two insolvents, viz, Vallabhdas Jairam and Bhanji Jairam, he found that they had "fraudulently and with intent to conceal the state of their affairs and to defeat the objects of the Act wilfully prevented and purposely withheld the production of letters written to them by their brother Dhanji Jairam relating to their affairs under investigation," and under section 50 of the Indian Insolvents Act (Stat. 11 & 12 Vict., c. 21) he sentenced them to imprisonment for three months for this offence.

The insolvents appealed on the following grounds:

- (a) That the learned Commissioner was wholly in error in holding that your petitioners had committed any of the offences mentioned in section 50 of the Act for the Relief of Insolvent Debtors in India.
- (b) That His Lordship's finding that your petitioners had suppressed letters from their brother Dhanji was not justified by any evidence given before the Court, and it was never attempted to be proved that any such letters were in existence.
- (c) That no specific charge was made against your petitioners in the grounds of opposition filed in this matter, nor was any charge made in the course of the hearing.
- (d) That the charge of concealing Dhanji's letters was never made till after the first petitioner's re-examination was nearly concluded and at the end of the case.
- (e) That although allegations and suggestions were made that Your Lordship's petitioners had concealed property, no evidence whatever was given to establish such allegation.
- (f) That His Lordship's order was wholly against the weight of evidence recorded in the case and was not justified by the evidence, oral and documentary, given before the Court.
- (g) On the evidence before the Court your petitioners submit that they were entitled to their discharge.
- (h) That the order of imprisonment for three months is opposed to justice, equity and good conscience.

Inverarity for appellants (insolvents):—The appellants have been convicted under section 50 of the Insolvent Act (Stat. 11 & 12 Vict., c. 21) for having suppressed letters received from their brother Dhanji. The conviction is illegal, because (1) the appellants were not charged with that offence, and (2) there was

no evidence that they had committed it.

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The first question that arises is whether the offences, for which by section 50 the Court is authorised to punish an insolvent, are criminal offences to the trial of which the principles of the criminal law are applicable. We submit they are. As to the nature of these offences, see Stat. 6 Geo. IV, c. 16, section 112; Stat. 12 & 13 Vict., c. 106, section 251; Bankruptcy Act, 1861, Stat. 24 & 25 Vict., c. 134, section 221, sub. cl. 6; 32 & 33 Vict., c. 62, section 11, cl. 8, and section 19; 46 & 47 Vict., c. 52, section 165; In re Rash Behari Roy (1); Yeo Swee Choon v. The Chartered Bank of India, &c. (2)

Then, if the offence for which the insolvents have been punished is a criminal offence, a specific charge of that offence is necessary: In re Pollard (3); In re Thompson (4); Kashinath v. Daji Garind. (5) The procedure prescribed by section 19 of Stat. 32 & 33 Vict., c. 62, ought to be followed in cases dealt with under section 50 of the Indian Insolvent Act. In the present case there was no charge framed at all. The first six grounds of opposition are not under section 50 of the Act. Grounds 7 and 8 are under that section, but are not specific and do not allude to the letters in respect of which the insolvents have been found guilty. It is clear from the evidence given that the insolvents were not aware that they were being tried for suppressing these letters or for any criminal offence. The evidence is that all letters from Dhanji were deposited with the Official Assignee, There is no finding as to intent: Queen v. Ingham. (6) We submit that the conviction is wrong—that the insolvents ought to be at once discharged from jail under section 73 of the Insolvent Act. I ask for the costs of this appeal.

Robertson and Jardine for opposing creditors contra.

^{(1) (1889) 17} Cal. 209.

^{(2) (1892) 19} Cal. 605.

^{(3) (1863)} L. R. 2 P. C. 106,

^{(4) (1870) 14} Cal. W. R. 257, 259.

^{(5) (1870) 7} Bom. H. C. Rep. 102 (A.C.)

^{(6) (1859) 29} L. J. (M. C.) 18.

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[Jenkins, C.I.:—We think that the insolvents should be discharged from jail.]

The order for discharge from imprisonment having been made, the Court proceeded to hear the appeal with reference to the insolvents' right to discharge under section 47 of the Insolvent Act. At the conclusion of the arguments the Court reserved judgment, which was delivered on the 6th March, 1903.

JENKINS, C.J.:—Vallabhdas Jairam and Bhanji Jairam, the appellants in Appeal No. 1261, and their brother, Khimji Jairam, having sought the benefit of the Act passed for the relief of Insolvent Debtors in India, their application for discharge was opposed, and on the 4th of February, 1903, an order was passed by the Commissioner in the following terms:

For as much as it appears to this Honourable Court that the said insolvents Vallabhdas Jairam Thackar and Bhanji Jairam Thackar have fraudulently, with the intent to conceal the state of their affairs and to defeat the objects of this Act, wilfully prevented and purposely withheld the production of letters written to them by their brother Dhanji Jairam, relating to such of their affairs as are subject to investigation under the Act, whereby they have brought themselves within the meaning of section 50 of Act 11 & 12 Vict., c. 21, this Honourable Court doth order and adjudge that the said insolvents Vallabhdas Jairam Thackar and Bhanji Jairam Thackar be forthwith taken into custody of the Jailor of His Majesty's Common Jail of Bombay on its criminal side to suffer simple imprisonment by virtue of a warrant under the seal of this Honourable Court and that they be there detained accordingly, and this Honourable Court doth further order and adjudge that the said insolvents Vallabhdas Jairam Thackar and Bnanji Jairam Thackar shall be discharged from the said custody so soon as the said insolvents Vallabhdas Jairam Thackar and Bhanji Jairam Thackar shall have been in custody on the criminal side of the said jail for a period of three calendar months, to be computed from the date of this order.

It was at the same time declared that Khimji Jairam was entitled to the benefit of the Act and to protection from arrest.

From this order of the Commissioner two appeals have been presented, the first by Vallabhdas Jairam and Bhanji Jairam, who contend that no offence has been committed, that the order for imprisonment was wrong, and that they were entitled to their discharge; and the second by Naranji Parmanand, one of the opposing creditors, who contends that Khimji Jairam should not have had his discharge, and that the insolvents have made away with and concealed portions of their property.

We have already reversed so much of the order as directed the imprisonment of Vallabhdas and Bhanji, but we deferred delivering judgment until the arguments on the whole case had been completed. The ground on which the imprisonment was directed was, according to the order as finally drawn up, that the appellants had, fraudulently and with intent to conceal the state of their affairs and to defeat the objects of the Act, wilfully prevented and purposely withheld the production of letters written to them by their brother Dhanji Jairam, and that thereby they had brought themselves within the operation of section 50 of the Indian Insolvent Act.

Now, it is clear that the proceedings, so far as they resulted in imprisonment, amounted to a criminal case, and "in all criminal cases it is necessary that there should be a charge, a finding and a conviction, as a foundation for the sentence. Everything should be strictly and accurately pursued; and if in any one of these three points a substantial defect should appear, it would be a ground for reversing the proceeding" (see Ex parte Van Sandau(1)). Similarly in the case of In re Pollard, (2) it is said that no person should be punished for contempt of Court, which is a criminal offence, unless the specific offence charged against him be distinctly stated and an opportunity of answering it given to him

In this case there was no charge: no question as to the letters was put to Bhanji or even to Vallabhdas until late in his examination (even then not in a pointed form) and there is no evidence to support the charge. Vallabhdas, when he was questioned on the matter, said, "I do not know where the other letters from Dhanji are if they are not in the Official Assignee's office." No search, however, was made there by the opposing creditors, though the Commissioner seems to have suggested it.

It is to be regretted that this suggestion was disregarded, for had a search been made, it would have been ascertained that among the insolvents' papers there were letters from their brother Dhanji.

It appears to me, then, that the conditions indicated in section 50 were not established, and that the order for imprisonment was

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wrongly made. This brings me to the question whether the appellants, Vallabhdas and Bhanji, are entitled to their personal discharge. Their brother Khimji has been discharged, and it does not appear that apart from the charge of suppression the Commissioner would have withheld from Vallabhdas and Bhanji the relief he granted to Khimji.

Before us their discharge has been opposed by Naranji Parmanand, who is represented by Mr. Jardine, and by Naranji Narsey and others, who have appeared by Mr. Robertson. Naranji Parmanand has based his opposition substantially on the third and fourth grounds mentioned in his petition of appeal. Naranji Narsey and those who co-operated with him have also stated grounds of opposition, but at the hearing they were not urged before us. I therefore propose to limit myself to the case sought to be made by Naranji Parmanand.

But, before proceeding to deal with the matter, I desire to comment on the inconvenient procedure which has been adopted. The grounds of opposition urged by the several opposing creditors are framed in the most general terms, and, as far as one can judge, without any serious attempt to ascertain what the real facts were. I recognise there often must be difficulties in the way of opposing creditors placing a clear case before the Court at the outset, but section 47 of the Act provides a machinery by which these difficulties can be effectually overcome. It may not always be necessary to make a reference as contemplated by that section; but, at any rate, it would be a convenient practice to grant such reasonable adjournments in the first instance as would enable the creditors to look into the insolvents' affairs, to ask for and receive from the insolvents such explanation as may be deemed necessary, and to re-state their grounds of opposition with more precision and definition. Unless some such procedure be adopted, the inevitable result is a roving and aimless examination in Court, occupying much time and leading to little practical result. The present case furnishes an apt illustration of what I have said, for even before us on appeal the opposing creditors were unable to bring forward any but the vaguest suggestions.

Now the first head of objection to the discharge of the insolvents has been the imputation that they fraudulently, with

intent to diminish the assets to be divided among their creditors, made away with and concealed the sum of Rs. 98,001-15-3 appearing in their schedule as a debt due by Dhanji Jairam to the insolvents' firm. Dhanji Jairam is a brother of the insolvents and, when the facts are examined, we find that this sum of Rs. 98,001-15-3 is a balance representing the results of trading for a period of thirteen years or so, and is in part made up of interest. It appears to me to be a misuse of the language to apply to such a position the expression that the sum of Rs. 98,001-15-3 had been made away with, or concealed. It is shown as an item in the insolvents' books and is disclosed in the insolvents' schedule.

But then it is said that the insolvents have been guilty of concealment because the sum is represented as their separate property, whereas it belonged jointly to them with their brother Dhanji. Even if the hypothesis on which this argument is based were correct, I still fail to see that there has been any making away or concealment; for, in describing it as their separate property and not their joint property, the insolvents represent that their creditors are entitled to the whole and not only to a fraction of the sum; and at the same time it is only by so regarding it that they can claim interest in respect of it. To argue that the securities held by Dbanji for this sum should have been disclosed, assumes, not only that such securities exist, but also that the insolvents were not (as they declared) separate from their brother. This in my opinion has not been made out, and accordingly I am of opinion that the ground of opposition so far as it relates to the sum of Rs. 95,001-15-3 has not been established.

The next ground of opposition is that a sum of Rs. 9,724-11-6 appearing as a cash balance at the end of Samvat 1956 according to the books of the insolvents' firm is unaccounted for. At first sight this appears a formidable objection; but the explanations which have been given before us satisfy me that it is only the appearances that are against the insolvents. No doubt one expects to find a correspondence between the cash box and the cash balance shown in the books; but an examination shows that the cash balance appearing in the books did not exactly

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represent the state of the cash box and I am satisfied on the evidence before us that the discrepancy must be ascribed to mistaken postings, and that this discrepancy has existed for a long time past and from a time when the insolvents were doing a prosperous business. By far the greater part of the discrepancy has been already explained and I think it very likely that a further examination of the books would complete the explanation. But be this as it may, the discrepancy does not justify the conclusion for which the opposing creditors contend and this ground of opposition has not been made out.

It only remains now to deal with the objection that the insolvents have fraudulently and with intent to diminish the assets to be divided among their creditors concealed their share as members of a joint and undivided Hindu family in the Oil Mill described in their schedule as the Ranchordas Dhanji Oil Mill. Now it will be perceived that this ground of objection is based on the assumption that the insolvents and their brother Dhanji were joint. I have already indicated my opinion as to the failure to establish this point in relation to the item of Rs. 98,001-15-3, and equally, in relation to the oil mill, I consider that the proof falls short of what is requisite to establish the insolvents' joint interest in the oil mill. [His Lordship then considered the evidence.]

The result is that in my opinion the opposing creditors have failed to make good their charge as to the mill.

This disposes of the first of the two appeals.

On the second nothing has been urged beyond that with which I have already dealt.

The case will now go back to the Commissioner that he may deal with it in the ordinary course. But the insolvents must have their costs of both appeals.

Appeal allowed.

Attorneys for the insolvents—Messrs. Tyabji, Dayabhai & Co.
Attorneys for the opposing creditors—Messrs. Matubhai,
Jamietran and Madon; Messrs. Payne, Gilbert, Sayani and Moos.

APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Chandavarkar.

CHUNILAL THAKORDAS MODI (ORIGINAL PLAINTIFF), APPELLANT, v. THE SURAT CITY MUNICIPALITY (OBIGINAL DEFENDANT), RESPONDENT.*

1903, March 11,

Municipality—Bomhay District Municipal Act (Bombay Act III of 1901), sections 82 (c), 86—House-tax—Suit for injunction restraining levy of tax—Right to sue in Civil Court without first proceeding under section 86—Injunction, when granted—Specific Relief Act (I of 1877), section 56—Discretion.

The Surat City Municipality served, under section 82, clause (3), of the Bombay District Municipal Act (III of 1901), a notice of demand upon the plaintiff for house-tax due by him. The plaintiff instead of proceeding under section 86 of the Act instituted a suit in the Civil Court for an injunction to restrain the Municipality from recovering the house-tax from him. The lower Courts rejected the claim on the ground that, as the plaintiff had omitted to appeal to a Magistrate under section 86 of the Act, his suit was premature.

Held, that section 86 was permissive merely, and that it did not make it incumbent in every case upon a party complaining of an illegal levy of a tax by a Municipality to appeal against the action of the Municipality to a Magistrate before suing in a Civil Court. But

Held, also (confirming the decree), that the injunction prayed for in this case could not be granted. By section 56 of the Specific Relief Act an injunction cannot be granted where efficacious relief can be obtained by any other usual mode of proceeding. Section 86 of Bombay Act III of 1901 gave a remedy to the plaintiff, but instead of resorting to it he filed this suit for an injunction. It was discretionary for a Court to grant an injunction and that discretion must be exercised judicially with extreme caution and only in very clear cases. This was not a case of that kind.

SECOND appeal from the decision of H. L. Hervey, District Judge of Surat, confirming the decree passed by Ráo Sáheb Gokuldas Vithaldas Saraiya, Joint Subordinate Judge at Surat.

Suit for an injunction restraining the Surat City Municipality from recovering a sum of Rs. 52-8-0 from the plaintiff.

The plaintiff owned a house in Surat. On the 12th December, 1901, he was served by the Municipality with a bill, dated the 15th October, 1901, for Rs. 52-8-0 alleged to be due from him as arrears of house-tax from 1894 to 1899. On the 24th December,

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1901, the plaintiff wrote to the Municipality a letter denying his liability and requesting that the bill should be cancelled. The Municipality returned no reply to this letter; but on the 16th April, 1902, it served upon the plaintiff a notice of demand for Rs. 52-8-0 under section 82, clause 3, of the Bombay District Municipal Act (Bombay Act III of 1901).

The plaintiff thereupon filed this suit in the Court of the Joint Subordinate Judge at Surat for "an injunction restraining the Municipality from recovering Rs. 52-8-0 demanded in its notice under clause 3 of section 82 of the Bombay District Municipal Act, 1901."

The Municipality contended (inter alia) that the Civil Court had no jurisdiction and that the plaintiff was not entitled to any relief as he had not complied with the provisions of the Municipal Act. (1)

The Subordinate Judge dismissed the suit on the ground that the plaintiff had not followed the procedure prescribed by section 86 of the Act.

(1) Section 82, clause 3, and section 86 of the Bombay District Municipal Act (Bombay Act III of 1901) are as follows:

Section 82, clause (3).—If the sum for which any bill has been presented as aforesaid is not paid in the Municipal office, or to a person authorized by any rule in that behalf to receive such payments, within fifteen days from the presentation thereof, the Municipality may cause to be served upon the person liable for the payment of the said sum a notice of demand in the form of schedule is, or to the like effect.

Section 86.—Appeals against any notice of demand issued under sub-section (3) of section 82 may be made to any Magistrate or Bench of Magistrates by whom, under the directions of the Governor in Council, or of the District Magistrate, such class of cases is to be tried.

But no such appeal shall be heard and determined unless-

(a) the appeal is brought within fifteen days next after service of the notice of demand complained of; and

(b) an application in writing, stating the grounds on which the claim of the Municipality is disputed, has been made to the Municipality as follows: that is to say—

(i) in the case of a rate on buildings or lands, within the time fixed in the notice given under section 65 or 66 of the assessment or alteration thereof, according to which the bill is prepared,

(ii) in the case of any other claim for which a bill has been presented under sub-section (1) of section 82, within fifteen days next after the presentation of such bill; and

(c) the amount claimed from the appellant has been deposited by him in the Municipal office.

The decree was confirmed by the District Judge, whose reasons were as follows:

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I agree with the Subordinate Judge in holding that the suit is premature . . . The meaning of the section (86) clearly is that if the owner or occupier of the house desires to appeal against the notice of demand, then the Magistrate to whom this class of cases is entrusted by the Governor in Council or the District Magistrate is the authority to whom the appeal is to be made. The case of Vasudevacharya v. The Municipality of Sholapur (I. L. R. 22 Bom. 384) is therefore distinguishable from the present one; for in that case the wording and context of the rule, of which the interpretation was in dispute, showed that it was to be construed as permissive and not mandatory. Appellant's pleader further argues that in any case plaintiff is entitled to seek relief in the Civil Courts, even if he has not exhausted his remedies under the Act. I am of opinion, however, that the Subordinate Judge is right in holding that no action will lie until the person aggrieved by the notice of demand has followed the course prescribed by the Act, and failed to get redress (see Sakharam v. The Municipality of Kalyan, 7 Bom. H. C. (A. C. J.) 33).

Plaintiff appealed.

M. N. Mehta for the appellant (plaintiff):—The lower Courts have held that the suit is premature inasmuch as the plaintiff did not resort to the procedure prescribed by section 82 of the Bombay District Municipal Act (Bombay Act III of 1901). Our contention is that the section is not imperative, but it is merely advisory; this is borne out by the use of the word "may" in the section: see Maxwell on Interpretation of Statutes. It is only where the exercise of a right is vested in a public body and the exercise of that right is for the benefit of the public body that the word "may" can be interpreted as "shall"; but where a statute confers a benefit on a class of people such as rate-payers, as in this case, then it is purely a matter of discretion with a person whether he should take advantage of that benefit or resort to the common law remedy of proceeding in a Civil Court. Section 86 of Bombay Act III of 1901 is analogous to section 525 of the Code of Civil Procedure (Act XIV of 1882), which lays down that an award may be filed within six months; but if a party fails to resort to that remedy, he does not lose his right of getting it enforced by a regular suit: Subbaraya Chetti v. Sadasiva Chetti.(1) The procedure prescribed by section 86 of Bombay Act III of 1901 is not preliminary to the filing

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of a suit in a Civil Court, but is merely concurrent; and if any one without resorting to the procedure laid down in section 86 chooses to file a suit in the Civil Court, he may do so. If the intention of the Legislature was to make the procedure under section 86 a necessary preliminary to an action in a Civil Court, it would have expressly said so in so many words, as it has done in section 11 of Act X of 1876. Our submission, therefore, is that section 86 is no bar to the present suit.

H. C. Coyaji for the respondent (defendant):-Section 86 of the Bombay District Municipal Act (Bombay Act III of 1901) is imperative and a person cannot, therefore, bring an action in a Civil Court without first resorting to the procedure therein laid down. This section does not actually take away the common law remedy, but provides that before resorting to that remedy a person should follow the procedure prescribed by the section. The section, in effect, provides for a less expensive and more speedy remedy and requires the person to resort to it in the first instance. Where a statute provides a special remedy. which is only in seeming conflict with common law, the two should be reconciled: Hardcastle on Statutory Law, page 307. The case of Sakharam v. The Chairman of the Municipality of Kalyan() lays down that where a statute has laid down a special procedure, that should be first resorted to. The plaintiff's suit is therefore premature.

M. N. Mehta in reply:—The case of Sakharam v. The Chairman of the Municipality of Kalyan⁽¹⁾ does not apply. The words in the section in that case were "shall in the first instance," which are imperative, whereas here the word is "may," which is primâ facie only directory.

CHANDAVARKAR, J.:—This was a suit brought by the appellant, Chunilal Thakordas Modi, for an injunction to restrain the Municipality of Surat from recovering Rs. 52-8-0 as arrears of house-tax for the years 1894 to 1899. Both the lower Courts have rejected the claim on the ground that the appellant having omitted to appeal under section 86 of the Bombay Act III of

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1901 to the Magistrate against the notice of demand issued by the Municipality, his suit is premature.

The view they have taken of section 86 is that it provides a remedy which ought to be exhausted before an action against a Municipality for an illegal levy of a tax can lie in a Civil Court. Neither the wording of section 86 nor any of the other provisions of the Act warrants that view. There is nothing in the section itself which makes it incumbent in every case upon a party complaining of an illegal levy of a tax by a Municipality to appeal against the action of the Municipality to a Magistrate or a Bench of Magistrates appointed by the Governor in Council to hear such appeals before suing in a Civil Court. Section 164 of the Act, which lays down the conditions subject to which suits against a Municipality can be brought, does not provide that a suit in respect of a notice of the demand of a tax by a Municipality cannot be brought unless the party suing has resorted to and exhausted the remedy provided by section 86. The remedy provided by that section is intended for the benefit of the party on whom the notice of demand is served, and both the language and spirit of the section show that it is permissive.

However, though we cannot accept the view of the lower Courts on the construction of section 86, we think that their decrees must be confirmed on the ground that the present is not a proper case for an injunction. The suit is substantially brought to restrain the Municipality from enforcing a money claim and there is neither principle nor authority for restraining by injunction one who alleges that he has a money claim against another from enforcing that claim in the manner sanctioned by law. According to section 56, clause (i), of the Specific Relief Act, an injunction cannot be granted where an equally efficacious relief can certainly be obtained by any other usual mode of proceeding. Under section 86 of Bombay Act III of 1901, it was open to the appellant to resort to the remedy provided by that section and obtain the relief which he seeks in this suit. Instead of resorting to it, he has come to a Civil Court and asks the Court to give him an injunction restraining the Municipality from enforcing its claim for the arrears of house-tax against him. He does not deny his liability to pay the tax after 1899; all he says is that he is not liable to pay the

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arrears due for certain years previous to 1899. It is open to him to pay the amount and then sue the Municipality for a refund; on the other hand, it is open to the Municipality to recover the amount by a distress warrant and sale. In either case, it cannot be said that there exists no standard for ascertaining the actual damage likely to be caused to the appellant or that pecuniary compensation cannot be given for the invasion of the appellant's right. It is discretionary with a Civil Court to grant an injunction, and that discretion must be exercised judicially with extreme caution and only in very clear cases. The present is not a case of that kind. We confirm the decree with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Chandavarkar.

1908. March 16. KONDIBA BIN BABAJI (ORIGINAL DEFENDANT No. 2), APPELLANT, v. NANA SHIDRAO AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANT No. 1), RESPONDENTS.*

Registration—Priority—Unregistered deed accompanied with possession—Subsequent sale by registered deed—Effect of possession—Possession for purposes of notice equivalent to registration—Duty of purchaser to inquire as to nature of possession—Registration Act (III of 1877), sections 49, 50.

On the 16th June, 1876, Regapuri mortgaged the lands in suit to the first defendant with possession, and the latter on the 26th June, 1876, leased them to the second defendant for one year. The second defendant remained in possession as tenant after the year had expired. On the 3rd December, 1878, while defendant 2 was in possession of the lands as tenant, Revapuri sold to him (defendant 2) her equity of redemption for Rs. 95. The deed of sale was not compulsorily registrable under the Act then in force, and owing to the death of Revapuri it was not registered. On the 8th December, 1895, the heir of Revapuri sold the equity of redemption in the mortgage of 1876 by a registered deed to the plaintiff. At the date of this sale to the plaintiff the second defendant was still in actual possession. The plaintiff brought this suit to redeem the lands from the mort-

^{*} Second Appeal No. 528 of 1901.

gagee (defendant 1), and added defendant 2 as a party, alleging that he was in possession as a tenant of the first defendant. The lower Courts passed a decree for the plaintiff, holding that his registered deed gave him priority over the second defendant, whose deed was unregistered. On appeal,

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Held (reversing the decree of the lower Courts), that the plaintiff's suit should be dismissed. Possession in certain cases, for the purposes of notice, has the same effect as registration. The plaintiff at the date of his purchase had notice of the possession of the second defendant, and that being so, it was the plaintiff's duty to inquire of the second defendant under what title he held, and if the plaintiff had done so, instead of assuming that the second defendant was still holding merely as tenant, he would have discovered that the second defendant had purchased the land.

SECOND appeal from the decision of G. C. Whitworth, District Judge of Sátára, confirming the decree passed by Ráo Sáheb B. Y. Gupte, Subordinate Judge of Mádha.

Suit for redemption. The plaintiff sued for the redemption of a mortgage of certain land executed on the 16th June, 1876, to the first defendant (Bahirjirao), alleging that he (plaintiff) had bought the equity of redemption on the 8th October, 1895, and that his deed was duly registered.

Defendant 2 alleged that he had purchased the equity of redemption in the mortgaged land on the 3rd December, 1878; that his deed was not compulsorily registrable under the Act then in force, and had not been registered in consequence of the death of the vendor, but that he (defendant 2) had been ever since in possession as owner, and he pleaded (inter alia) that the plaintiff's suit was barred by limitation.

It appeared that the lands in question belonged originally to one Revapuri. On the 16th June, 1876, she mortgaged them with possession to the first defendant (Bahirjirao) for Rs. 1,000, who thereupon on 26th June, 1876, leased them to the second defendant for one year only, but the latter continued to hold them as a tenant of the first defendant after the expiration of the lease.

On the 3rd December, 1878, Revapuri sold her equity of redemption to defendant 2 for Rs. 95. The deed of sale, as already stated, was not compulsorily registrable and was not registered, as Revapuri died before it could be registered.

On the 8th October, 1895, Rampuri, the heir of Revapuri, sold

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the equity of redemption in the mortgage of 1876 to the plaintiff under a deed of sale which was registered.

The plaintiff filed this suit in 1898 to redeem the mortgage of 1876. He made the second defendant a party, alleging that he held the lands as a tenant of defendant 1.

The Subordinate Judge held that the plaintiff's purchase was entitled to priority over the purchase by defendant 2, as his deed of sale was registered. He therefore passed a decree for redemption in plaintiff's favour.

This decree was confirmed on appeal by the District Judge.

Defendant 2 appealed to the High Court, contending, among other things, that the lower Courts were wrong in giving priority to plaintiff's registered sale-deed, inasmuch as his (defendant's) deed, although not registered, was accompanied with possession.

M. B. Chaubal for the appellant (defendant 2).

D. A. Khare for respondent No. 1 (plaintiff).

The following cases were referred to:—Keshav v. Vinayak⁽¹⁾; Jethabhai v. Girdhar⁽²⁾; Chunilal v. Ramchandra⁽³⁾; Chinto v. Janki ⁽⁴⁾; Kantheppa v. Sheshappa⁽⁵⁾; Lakshmandas v. Dasrat ⁽⁶⁾; Waman v. Dhondiba ⁽⁷⁾; Nallamuttu v. Betha⁽⁸⁾; Cholmondeley v. Clinton ⁽⁹⁾; Penvil v. Luscomb.⁽¹⁰⁾

CHANDAVARKAR, J.:—The points of law involved in the second appeal turn upon certain facts which are not in dispute and which may be shortly stated.

On the 16th of June, 1876, one Revapuri mortgaged the land in dispute to defendant No. 1, Bahirjirao bin Shidojirao. It was a mortgage with possession. The mortgagee, defendant No. 1, leased the land to defendant No. 2, Babaji, under a kabulayat for one year on the 26th of June, 1876.

On the 3rd of December, 1878, when defendant No. 2 was in possession as a tenant of the mortgagee (defendant No. 1), the

^{(1) (1893) 18} Bon. 355.

^{(2) (1894) 20} Bom. 158.

^{(3) (1896) 22} Bom. 213,

^{(4) (1892) 18} Bom. 51.

^{(5) (1897) 22} Bom. 893.

^{(6) (1882) 6} Bom. 168.

^{(7) (1879) 4} Boin. 126.

⁽S) (1899) 23 Mad. 37.

^{(9) (1820) 2} J. & W. 1.

^{(10) (1728)} Moseley 72, 122.

mortgagor, Revapuri, sold to defendant No. 2 her equity of redemption for Rs. 95. The deed of sale was not registered, not being compulsorily registrable under the Registration Act then in force. From that time up to the date of the present suit defendant No. 2 has continued in possession of the land.

On the 8th of October, 1895, one Rampuri, an heir of Revapuri, sold the equity of redemption by a registered deed to the plaintiff, Shidrao Keshavrao Shinde.

The plaintiff brought this suit to redeem the land from defendant No. 1, adding defendant No. 2 as a party, and alleging that he was in possession as a tenant of defendant No. 1.

Both the lower Courts have awarded his claim, holding that the plaintiff's registered deed is entitled to priority over the unregistered deed of defendant No. 2 under section 50 of the Registration Act (III of 1877). Defendant No. 2 has filed this second appeal.

Mr. Chaubal, for the appellant, has contested the legal propriety of the decree of the lower Appellate Court on three grounds: (1) that there can be no competition under section 50 of the Registration Act between the plaintiff's registered and defendant No. 2's unregistered deed, because the vendor in either case is not the same; (2) that, assuming that section 50 applies, defendant No. 2, having dealt with the land as owner in possession for more than twelve years from the date of his purchase, acquired an indefeasible title to it by adverse possession at the date of the plaintiff's purchase, so that the plaintiff's vendor had no title to sell; (3) that assuming no case of adverse possession arises in favour of defendant No. 2, his possession at the date of the plaintiff's purchase was notice to the latter of his title as owner acquired under his unregistered sale-deed.

As to the first of these points, it is, we think, unarguable and is, moreover, covered by authority by which we are bound. Though the person under whom the plaintiff claims is not the same from whom defendant No. 2 purchased the equity of redemption, he (i. e., the plaintiff's vendor) is found by both the lower Courts to be the heir of defendant No. 2's vendor and to have sold the property to the plaintiff in that character,

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Legally, therefore, it is the same person who sold the property in either case. This view is supported by the decision of this Court in *Chunital* v. *Ramchandra*, (1) following *Makandas* v. *Shankardas*, (2)

The second of the grounds urged by Mr. Chaubal in this second appeal presents more difficulty, having regard to the fact that defendant No. 2 admittedly came into possession under and by virtue of an assignment from the true owner. The question is whether he can, under those circumstances, be said to have been in possession adverse to the owner. The definition of adverse possession is that it is possession which is wrongful, and it cannot be said that defendant No. 2 first entered and then continued in possession for more than twelve years as a wrong-doer. We do not think, however, that it is necessary to decide the question of adverse possession which arises in the case, and we refrain from expressing any opinion on it, because we are satisfied that the appellant must succeed on the third ground urged by Mr. Chaubal.

It is found by the lower Appellate Court that defendant No. 2 was in actual possession at the date of the plaintiff's purchase. The law is too well established in this Presidency to be doubted, that possession may have in certain cases, for the purposes of notice, the same effect as registration. The decided cases which have laid that down as the law have all been collected by Mr. Justice Batty in his recent judgment in Tajudin v. Govind.(3) The lower Appellate Court does not appear to have lost sight of that legal principle in deciding this case; but the view it has taken is that defendant No. 2's actual possession was not notice to the plaintiff of the previous sale, because that possession can be "referred to the lease granted to him by the first defendant, the mortgagee." We are of opinion that this view of the lower Appellate Court is erroneous. If the plaintiff had notice of defendant No. 2's actual possession-and on the finding of the lower Court we must hold that he had-it must be held also that he had constructive notice of the real title on which defendant No. 2

^{(1) (1896) 22} Bom. 213. (2) (1875) 12 Bom. H. C. 241, (3) (1901) 5 Bom. L. R. 143.

was in enjoyment of the land. Having had notice of defendant No. 2's possession, it was his duty to inquire of defendant No. 2 under what title defendant No. 2 really held, and had he inquired he would have discovered defendant No. 2's purchase.

The law on the subject is thus stated by the editors of White and Tudor's Equity Cases in their notes on the leading case of Le Neve v. Le Neve(1): " As a general rule if a person purchases and takes a conveyance of an estate which he knows to be in the occupation of another than the vendor, he is bound by all the equities which the party in such occupation may have in the land; for possession is prima facie seisin; and the purchaser has, therefore, actual notice of a fact by which the property is affected, and he is bound to ascertain the truth." In Mancharii Sorabji Chulla v. Kongoscoo, (2) Couch, C.J., went at some length into the question and came to the same conclusion. He there cited the English cases on the subject, the first of which was Taylor v. Stibbert, (3) where Lord Rosslyn said: "I have no difficulty to lay down, and am well warranted by authority, and strongly founded in reason, that whoever purchases an estate from the owner, knowing it to be in the possession of tenants, is bound to inquire into the estates these tenants have . . It was sufficient to put the purchaser upon inquiry, that he was informed the estate was not in the actual possession of the person with whom he contracted; that he could not transfer the ownership and possession at the same time; that there were interests, as to the extent and terms of which it was his duty to inquire." The next case cited by Couch, C.J., is that of Jones v. Smith, (4) where Vice-Chancellor Wigram said: "First, it was said that if a person purchases an estate which he knows to be in the occupation of another than the vendor, he is bound by all the equities which the party in such occupation may have in the land. I do not dispute this proposition (Allen v. Anthony (5); Daniels v. Davison⁽⁶⁾; Taylor v. Stibbert⁽³⁾) for possession is prima facie evidence of a seisin in fee." Then of Daniels v. Davison, (6) Couch, C.J., said: "The Lord Chancellor held that where

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^{(1) 2} W. & T. L. C. 225 (7th Edn.)

^{(2) (1869) 6} Bom. H. C. 59.

^{(3) (1794) 2} Ves. Jun. 437, 439.

^{(4) (1841) 1} Hare 43, 60.

^{(5) (1816) 1} Mer. 282.

^{(6) (1809) 16} Ves. 249; 17 Ves. 433.

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there is a tenant in possession under a lease, or an agreement, a person purchasing part of the estate must be bound to inquire on what terms that person is in possession; that a tenant being in possession under a lease, with an agreement in his pocket to become the purchaser, those circumstances altogether give him an equity repelling the claim of a subsequent purchaser who made no inquiry as to the nature of his possession." Couch, C.J., then says: "Although Daniels v. Davison(1) has always been considered an extreme case, beyond which the doctrine ought not to be extended, it has to that extent been repeatedly acted upon (Bailey v. Richardson(2); Barnhart v. Greenshields(3); Knight v. Bowyer(4)). I am not aware of any decision where the doctrine has been applied to the case of a person being in possession as the object of a charitable trust and under the trust. but I can see no difference in principle between this and the possession of a tenant, as the duty to make inquiry arises from the fact that the estate is not in the actual possession of the vendor. There is the same equity in both cases."

This decision of Couch, C.J., was approvingly cited by Sargent, C.J., and Melvill, J., in Santaya v. Narayan. (5) The most recent case that we have been able to find where the same law is expounded is that of Hunt v. Luck, (6) where Vaughan Williams, L.J., says (Stirling and Cozens-Hardy, L.J., concurring): "If a purchaser or a mortgagee has notice that the vendor or mortgagor is not in possession of the property, he must make inquiries of the person in possession—of the tenant who is in possession—and find out from him what his rights are, and if he does not choose to do that, then whatever title he acquires as purchaser or mortgagee will be subject to the title or right of the tenant in possession. That, I believe, is a true statement of the law."

It follows, then, both on principle and authority, that the plaintiff having had notice of defendant No. 2's actual possession at the date of his (plaintiff's) purchase, was bound to inquire of him as to the nature of his possession, instead of assuming

^{(1) (1809) 16} Ves. 249: 17 Ves. 433.

^{(2) (1852) 9} Hare 734.

^{(3) (1853) 9} Moo. P. C. C. 18,

^{(4) (1857) 23} Beav. 609.

^{(5) (1883) 8} Bom. 182.

^{(6) (1902) 1} Ch. 428 at p. 433.

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that because that possession had originally commenced under a tenancy, it must have continued under that title on the day when the plaintiff purchased the land.

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On this ground, therefore, we are of opinion that the decree of the lower Appellate Court should be reversed and the plaintiff's claim rejected with costs throughout on him.

Decree reversed.

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

THE BOMBAY BURMAH TRADING CORPORATION, LIMITED, PETITIONERS, v. DORABJI CURSETJI SHROFF, OPPONENT.

1903. March 20.

Privy Council—Application for leave to appeal—Companies Memorandum of Association Act (XII of 1895), sections 9 and 10—Appeal against order passed under the Act—Test of pecuniary sufficiency or substantial question of law—Civil Procedure Code (Act XIV of 1882), sections 594, 595 and 647—Case otherwise fit for appeal—Practice—Procedure.

A petition by a Company for the confirmation of a special resolution altering the Memorandum of Association was dismissed by the High Court.

The Company desired to appeal to His Majesty in Council. Leave to appeal was opposed on three grounds: (1) that no appeal lay under the Memorandum of Association Act or Companies Act; (2) that the pecuniary test was not satisfied; (3) that there was no substantial question of law.

Held, that the order dismissing the petition was a "decree" within the definition of that term contained in section 594 of the Code.

Held, as to objections (2) and (3), that the only question was whether the case was a fit one for appeal to the King in Council within the meaning of clause (b) of section 595.

Held, further, that having regard to the fact that the commercial and financial position of the Company might be seriously affected by the questions at issue, and to the importance to Indian Companies generally of having such rights precisely defined, the case ought to be certified as a fit one for appeal to His Majesty in Council.

Held, further, that the proceedings fell within Chapter XLV of the Civil Procedure Code.

Application by the above Company for leave to appeal to the Privy Council.

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A petition by the Company for the confirmation of a special Resolution altering the Memorandum of Association was dismissed by the High Court (see *supra*, page 113). From that decision the Company desired to appeal to the Privy Council.

The petition for leave set forth the facts, the decision of the High Court and the grounds of appeal therefrom, and stated that a substantial question of law was involved. The prayer was as follows:

- 7. Your petitioners, therefore, pray that Your Lordship will be pleased-
- (a) to declare that this case is a fit one for appeal to His Majesty in Council (and that there is a substantial question of law to be decided); and
- (b) to admit their petition and to transmit to His Majesty in Council under the seal of this Honourable Court a correct copy of the record so far as is material to the questions in dispute herein.

Lowndes for the Company applied for leave to appeal in accordance with the prayer of the petition.

Branson for the opponent:—No appeal lies to the Privy Council from a decision of this Court in cases decided under the Companies Act. The English rule of law is that there is no appeal unless the right to appeal is expressly given, and where no right of appeal is given, leave to appeal cannot be granted. The only sections of the Companies Act dealing with the point are sections 58 and 169. No other appeal is given. See also Act XII of 1895. Sections 9 and 10 of this latter Act seem to show that no appeal to the Privy Council was contemplated. He also cited Attorney General v. Sillem (1); Minakshi v. Subramanya (2); Narayan v. Secretary of State (3); Jamiyatram v. Gujarat Trading Company (4); Safford and Wheeler's Privy Council Practice, Part III, Chapter 2. Next, is this a fit case for appeal? See Moti Chand v. Ganya Prasad (5); Karuppanan v. Srinivasan (6); Mirza v. Abdul Latif. (7)

Lowndes in reply:—A right of appeal is given by the High Court Charter. The only question is whether the decision from

^{(1) (1864) 10} H. L. C. 704,

^{(2) (1887) 11} Mad. 26.

^{(3) (1895) 20} Bom, 803.

^{(4) (1869) 6} Bom. H. C. R. 185 (A. C.)

^{(5) (1901) 24} All. 174, 177.

^{(6) (1901) 29} Ind. Ap. 40; 25 Mad. 215.

^{7) (1875) 12} Bom. H. C. R. 8.

which an appeal is sought is a final judgment under clauses 15 and 39 of the Charter. It does not matter whether the Acts give an appeal or not. Jamiyatram v. The Gujarat Trading Company (1) was prior to the Charter. He also referred to In re West Hopetown Tea Company (2); Mirza v. Abdul Latiff (3); Lutf Ali v. Asgur Reza. (4)

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JENKINS, C.J.:—In October, 1902, this Bench dismissed a petition, presented under the Indian Companies (Memorandum of Association) Act (XII of 1895), on the ground that no such resolution as the law requires has been passed. From this order the Company desires to appeal to His Majesty in Council.

In opposition to the application it was urged before us by Mr. Branson, first, that no appeal lay under the Memorandum of Association Act or under the Companies Act; secondly, that the pecuniary test had not been satisfied; and thirdly, that there was no substantial question of law.

To the first of these objections the answer appears to me to be that if there has been a decree, then there is a right of appeal under the Code of Civil Procedure, subject to the conditions thereby prescribed. Section 594 of the Code, which is in the chapter regulating appeals to the King in Council, provides that in that "chapter, unless there be something repugnant in the subject or context, the expression decree includes also judgment and order." It seems to me clear that our order of October last falls within this definition of a "decree."

The other objections are, no doubt, of weight where they are applicable, but here we have to consider whether the case is not a fit one for appeal to the King in Council within the meaning of clause (b) of section 595. The only question, therefore, is whether we ought to give in this case a certificate of fitness.

It is perfectly true that it cannot with precision be said that the amount or value of the subject-matter of the suit is Rs. 10,000 or upwards, or that the amount or value of the dispute on appeal is of that sum or upwards; but the reason why that cannot be said is, because the value of the question at issue between the

^{(1) (1869) 6} Bom. H. C. R. 185 (A. C.)

^{(2) (1986) 9} All. 180.

^{(3) (1875) 12} Bom, H. C. R. S.

^{(4) (1890) 17} Cal. 455.

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parties is one to which it is impossible to give a numerical expression. It is, however, obvious that the financial and commercial position of the Company may be seriously affected by the questions at issue, and having regard to that and to the importance to Indian Companies generally that these rights should be precisely defined in relation to the point that has arisen in this case, I think that we ought to certify that the case is a fit one for appeal to His Majesty in Council, and we accordingly do so certify.

I have dealt with the case under the Code, because I think that by virtue of section 647 of the Code the present proceedings come within the provisions of Chapter XLV.

The costs to be costs in the appeal.

Attorneys for the Company-Messrs. Craigie, Lynch and Owen.

Attorneys for the opponent-Messrs. Ardesur, Hormasji and Dinsha.

APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Chandavarkar.

1903. April 1. BHIKABHAI RATANCHAND (ORIGINAL DEFENDANT 2), APPELLANT, v. BAI BHURI (ORIGINAL PLAINTIFF), RESPONDENT.*

Res judicata—Civil Procedure Code (Act XIV of 1882), section 13—Suit for arrears of maintenance—Former suit for arrears for a different period—Surety—Continuing guarantee—Pleadings by surety denying liability in a suit do not operate as notice of revocation of suretyship—Contract Act (IX of 1872), section 130.

By a settlement executed in 1896 the first defendant agreed (inter alia) to pay maintenance to the plaintiff (his wife) at the rate of Rs. 91 per annum. The second defendant signed the deed as surety. In 1898 the plaintiff sued both defendants to enforce her rights under the settlement and (inter alia) for arrears of maintenance for ten months and sixteen days from the 10th November 1897. The defendants pleaded that the deed was void for want of consideration. The first Court found that the settlement was not void, and passed a decree against both the defendants, but as to the payment of arrears of maintenance the

decree was against the first defendant only. The second defendant appealed against the decree so far as it was against him, contending that the settlement was not in any way binding on him. The plaintiff filed cross-objections to the decree, contending that the second defendant ought to have been held liable for the arrears of maintenance. At the hearing of the appeal, however, the plaintiff withdrew her cross-objections, and the decree of the first Court was confirmed with costs.

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In 1901 the plaintiff filed this suit against both defendants to recover arrears of maintenance for two years and nine months, commencing from the 27th September, 1898. The second defendant pleaded that, inasmuch as he had not been held liable for maintenance in the former suit, the plaintiff's claim was resjudicata.

The lower Courts passed a decree for the plaintiff, holding that her claim was not res judicata. On appeal to the High Court,

Held, confirming the decree of the lower Courts, that the plaintiff's claim against the second defendant in this suit was not resjudicata. The only point that was resjudicata against her by the former suit was her right to the arrears therein claimed, but that did not bar her right to sue the second defendant as surety in respect of the subsequent arrears claimed in the present suit.

It was contended for the second defendant that the pleadings in the former suit operated as notice under section 130 of the Contract Act (IX of 1872), and put an end to his contract of guarantee.

Held, that the denial by the second defendant of his liability in the pleadings in that suit was made for the purposes of pleading and could not have any other effect than was given to it in the suit itself. It could not operate as notice under section 180 of the Contract Act.

SECOND appeal from the decision of Mr. S. L. Batchelor, District Judge of Ahmedabad, confirming the decree passed by Ráo Bahádur Chandulal Mathuradas, First Class Subordinate Judge at Ahmedabad.

Suit by a wife to recover arrears of maintenance from her husband (defendant 1) and his surety (defendant 2).

By a deed of settlement dated the 23rd June, 1896, the first defendant agreed to provide a house for the plaintiff (his wife), or in default to pay her Rs. 1,000 as its price, and further to pay her maintenance at the rate of Rs. 91 per annum. This deed was signed by the second defendant as surety for the first defendant.

In 1898 the plaintiff sued both the defendants (Suit No. 568 of 1898) for the settlement of the house or its price and for arrear of maintenance for ten months and sixteen days from the 10th November, 1897.

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BHIKABUAI v. BAI BHURI. The defendants pleaded (inter alia) that the deed was void as being without consideration.

The Court of first instance held that the deed was not void for want of consideration, and passed a decree against both the defendants so far as the prayer for the house was concerned, but as regards the arrears of maintenance it passed a decree against the first defendant only.

The second defendant appealed against that decree (so far as it was against him) on the ground that the agreement in question was not binding upon him; and the plaintiff filed cross-objections that the second defendant was liable for the arrears of maintenance under the agreement.

At the hearing of the appeal the plaintiff orally withdrew her cross-objections, and the decree of the Court of first instance was confirmed.

In 1901 the plaintiff filed the present suit against both the defendants to recover arrears of maintenance at the rate of Rs. 91 per year for two years and nine months, commencing from the 27th September, 1898.

The first defendant pleaded poverty, but offered to pay Rs. 50 per year as maintenance to the plaintiff.

The second defendant pleaded that, inasmuch as by the decree in the former suit he was not held liable for maintenance, the plaintiff's present claim as against him was res judicata.

The Subordinate Judge passed a decree for the plaintiff against both the defendants. In his judgment he said:

The second defendant contends that the claim for maintenance as against him is barred under the provisions of section 13 of the Code of Civil Procedure. It cannot be denied that there was a suit by the present plaintiff against the present defendants to recover maintenance for previous months. The lower Court awarded that claim against defendant 1, and rejected it, though not in so many terms, as against the second defendant. No reasons were given for the dismissal of the claim as against the second defendant, and the order of dismissal was appealed against, but the objection was withdrawn in appeal. The subject-matter in that case was different from the subject-matter in this suit.

On appeal the decree was confirmed by the District Judge on the following grounds:

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The point is whether in that (former) suit the question of appellant's liability under the deed was heard and determined within the meaning of section 13 of the Civil Procedure Cole. It appears to me clear that it was not. The pleadings, the issues and the judgment in Exhibit 22 all show that the two defendants then made common cause. The issues were concerned with the genuineness of Exhibit 18, the liability of the two defendants jointly to purchase a house for plaintiff and to pay her the arrears of maintenance No question was raised as to defendant 2's separate position, or whether for any reason he was entitled to be discharged from his liability as surety, nor is there a word said in the judgment on these points until we come to the decretal order, where the Subordinate Judge, for some reason unexplained, orders that the maintenance shall be recoverable from the husband (defendant 1) only. Both the defendants were made liable for the purchase of the house, and against this part of the decree defendant 2 appealed, while plaintiff filed crossobjections maintaining that defendant 2 was equally liable for plaintiff's maintenance. These cross-objections were, however, orally withdrawn in argument by plaintiff's pleader, and the Appellate Court thus merely confirmed the original Court's decree. On these facts I am of opinion that appellant cannot now claim the benefit of section 13, Civil Procedure Code, since the matter now in issue—his separate liability as a surety —was not directly and substantially in issue in the former suit and was not heard and decided. It was for defendant 2 (appellant) to take this present objection in the former suit; as he failed to do so. I think he cannot now claim that the point was judicially decided, merely because the Subordinate Judge in his decretal order, for no reason which can be collected from the judgment, restricted to defendant 1 the liability for arrears of maintenance then due. Moreover, the main relief prayed for in the former suit was the purchase of a house, and that relief was granted as against both defendants. For these reasons I think the plea of res judicata fails.

The second defendant appealed to the High Court.

P. M. Mehta (with him L. A. Shah) for the appellant (defendant 2):—The plaintiff's claim against the second defendant is resjudicata. The same claim was made in the former suit, but the decree in that suit as regards maintenance was against the first defendant only. Therefore under explanation III of section 13 of the Civil Procedure Code (XIV of 1882) it must be deemed to have been refused. That decree was confirmed in appeal, and the cross-objections filed by the plaintiff on the point of the second defendant's liability were withdrawn. Under explanation II of section 13 it was necessary for the plaintiff in that former suit to raise the general question of the second defendant's liability for maintenance in order to establish her claim against him.

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The question, therefore, must be deemed to have been heard and decided against her: Kameswar Pershad v. Rajkumari Ruttun Koer⁽³⁾; Peary Mohun Mukerjee v. Ambica Churan.⁽²⁾ Next, we submit that, having regard to the pleadings in the former suit, the guarantee of the second defendant is at an end: section 130 of the Contract Act (IX of 1872).

M. P. Modi (with him G. S. Rao) for the respondent (plaintiff):—In the previous litigation the general question as to the binding character of the agreement was raised and decided against both the defendants. No doubt we claimed arrears of maintenance from both the defendants, and so far the relief against the second defendant must be deemed to have been refused. But the general question whether or not the agreement was bad for want of consideration was decided against both the defendants and is now res judicata against the second defendant. It was not necessary for us to raise separately the question of the general liability of the second defendant for maintenance, and it could not be treated as having been decided against us. As regards the second point, admittedly no notice was given under section 130 of the Contract Act (IX of 1872), and the pleadings in the previous suit cannot be treated as notice under that section.

CHANDAVARKAR, J.:—We agree with the Courts below in the view that the present suit, which was brought by the plaintiff to recover the arrears of maintenance for two years and nine months, commencing with the 27th September, 1898, due upon a deed executed by the first defendant, who is her husband, and by the second defendant as surety for him, is not barred so far as the second defendant's liability is concerned by the decree in Suit No. 568 of 1898.

In that suit, no doubt, the plaintiff sought to hold the second defendant liable as surety for the arrears claimed therein on the basis of the deed on which the present action is founded, and it is also true that the Subordinate Judge passed a decree therein for the arrears claimed as against defendant 1 only. But "in order to see what was in issue in a suit or what has been heard

^{(1) (1892) 20} Cal. 79; 19 I. A. 234.

^{(2) (1897) 24} Cal. 900.

and decided, the judgment must be looked at. The decree, according to the Code of Civil Procedure, is only to state the relief granted or other determination of the suit ": Kali Krishna Tagore v. The Secretary of State for India.(1) Now, the judgment in the previous suit did not decide the question of the second defendant's liability as surety in his favour. On the other hand, it shows that the Subordinate Judge found that the deed was executed by both the defendants and was supported by consideration, and that the plaintiff was entitled to the reliefs sought. But for some reason or other in the decretal order he held the first defendant only liable for the arrears. Taking the judgment and the decree together, we think we must take them to mean that the Subordinate Judge refused merely the relief as to the arrears claimed in the suit so far as defendant 2 was concerned. That is the only point which is res judicata as against the plaintiff. She alleged her right as against that defendant as surety, and that was found in her favour in the judgment, and the mere fact that the arrears of the particular period to which the previous suit related were not allowed by the decree. so far as defendant 2 was concerned, cannot bar her right to sue him as surety on the same document as to the arrears of a subsequent period, the cause of action as to which is distinct and separate. "Where the cause of action is the same and the plain. tiff has had an opportunity in the former suit of recovering that which he seeks to recover in the second, the former recovery is a bar to the latter action. To constitute such former recovery a bar, however, it must be shown that the plaintiff had an opportunity of recovering, and, but for his own fault, might have recovered in the former suit that which he seeks to recover in the second action": per Willes, J., in Nelson v. Couch.(2) Applying this principle to the facts of the present case, the plaintiff could not have recovered in the former suit the arrears now claimed, for then they had not become due. All that she could have done in that suit she did. She could have relied on the deed and sought to hold defendant 2 liable on it, and she did both. The judgment was that defendant 2 was liable on the deed; so far

^{(1) (1888)} L. R. 15 I. A. 193; 16 Cal. 173.

^{(2) (1863) 15} C. B. N. S. 99 at pp. 108, 109.

BHIRABHAI v. BAI BHURI. her general right based on the deed was found in her favour. All that went against her was the decretal order refusing to award to her the arrears due for the period to which the suit related. Her present suit is not for those arrears, but is for the arrears due for a subsequent period, and in virtue of a general right based on the deed passed by both the defendants and found valid and binding as against both in the previous suit. The plea of res judicata, therefore, fails.

As to the second point, the mere fact that the second defendant denied his liability as surety in the previous suit cannot be regarded as a notice putting an end to the contract under section 130 of the Contract Act. That denial was made for the purposes of pleading, and cannot have any other effect given to it than was given in the suit itself. See Balaji Sitaram v. Bhikaji Soyare, (1) where Westropp, C.J., held that a mere denial of liability by a party in a previous suit cannot operate as notice. Moreover, the second defendant in the previous, suit denied the existence of a legal contract; such denial cannot be given the effect of a notice to the plaintiff that the second defendant wished to put an end to a legal contract which is proved. We confirm the decree with costs.

Decree confirmed.

(1) (1881) 8 Bom. 164.

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Butty.

1903. March 27. April 4, 17. HARI PANDURANG AND ANOTHER, PLAINTIFFS, v. SECRETARY OF STATE FOR INDIA IN COUNCIL AND THE TRUSTEES FOR THE IMPROVEMENT OF THE CITY OF BOMBAY AND JAMES MCNEILL, SPECIAL COLLECTOR UNDER THE LAND ACQUISITION ACT FOR THE ACQUISITION OF LAND FOR THE PURPOSE OF THE CITY OF BOMBAY IMPROVEMENT TRUST, DEFENDANTS.*

Jurisdiction—Improvement Trust Act (Bom. Act IV of 1898)—Legislative powers of Governor of Bombay in Council—Jurisdiction of High Court to consider whether ultra vires—Subordinate Legislature—Creation of new

Courts—Land Acquisition Act (I of 1894)—Indian Councils Acts, 1861 and 1892—Questions of policy, High Court's power to discuss—Tribunal established by Improvement Trust Act not a Court—Notices—Formality, no injury caused by error in—What defects vitiate an Act—Civil Procedure Code (Act XIV of 1882), section 424—Injunction against Secretary of State—Ex parte injunction when not to be granted—Notice of suit.

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In the year 1898 certain improvements were projected in the City of Bombay, and an Act, called the City of Bombay Improvement Act, 1898, was passed, giving to a Board thereby constituted certain powers with a view to carry these improvements into effect.

On the 25th of September, 1902, there was published in the Bombay Government Gazette a declaration, purporting to be in pursuance of the Act, stating that the Governor of Bombay in Council had sanctioned a street scheme made by the Trustees for the Improvement of the City of Bombay under the provisions of the Act (that being the style of the Board thereby constituted), and that certain lands, including those in suit, were "needed to be acquired by the said Trustees for the purposes of executing the said street scheme" and were required for a public purpose.

The plaintiff received notices from the Special Collector (defendant 3) stating that certain premises therein mentioned were about to be taken up by Government under Act I of 1894 (Land Acquisition Act) and that the said properties were to be acquired under the said Act. The notice did not purport to be issued under the City of Bombay Improvement Act.

Held, as the Improvement Act did not prescribe that the notice should be expressed to be under that Act, there was no omission of a formality directed by the Act, and that the plaintiff had not been shown to have been in any way misled or damnified by what was, at most, a misdescription.

One of the Special Collectors, having made an award of the compensation to be allowed, gave notice to the plaintiffs to hand over possession. The plaintiffs thereupon commenced this suit against the Secretary of State for India in Council and the Trustees for the Improvement of the City of Bombay. The Special Collector was subsequently added as a party.

It was contended by the plaintiffs that the Improvement Act was ultra vires of the Bombay Legislature.

Held, that the Governor of Bombay in Council is a subordinate Legislature, so that the High Court has the right and is charged with the duty of deciding judicially whether the impugned legislation is within the scope of its authority.

Held, further, that the Act was not ultra vires in that it amended or repealed the Land Acquisition Act so far only as it affected a particular corporation in a particular locality. The reference to the "province" in section 5 of the Indian Councils Act, 1892, is merely for the purpose of defining the limits of legislative operation and in no way imposes the condition that all legislation should affect the whole of that area.

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Query: Whether the Land Acquisition Act is amended or repealed by the Improvement Act, having regard to the fact that the Board of Trustees is not a company within the meaning of the former Act, while the compensation is not payable out of the public revenues or out of any fund controlled or managed by a local authority.

It was further contended that the Improvement Act did not comply with the provisions of the Indian Councils Act, 1861, in that it was not in fact "for the peace and good government" of the Presidency.

Held, that the High Court had no jurisdiction to discuss the policy of the Act.

It was further contended that the Act was vitiated, in that it created a new Court and thereby interfered with the functions and jurisdiction of the High

As to this it was held (1) that the tribunal created by the Act was not a Court and was therefore free from the control and supervision of the High Court except where an appeal was sanctioned by its President; (2) that the Improvement Act could not confer on the High Court jurisdiction to entertain appeals from such a tribunal; (3) that the whole Act was not vitiated merely by this defect in the prescribed machinery for ascertaining the compensation payable; (4) applying the principle of the Colonial Laws Act, 1865, to the Improvement Act, the provisions for taking possession are not void.

It was contended on behalf of the Secretary of State that, having regard to section 424 of the Civil Procedure Code, the suit was not maintainable against him as no notice of suit had been given.

Held, that in the circumstances of this case no injunction could be claimed against the Secretary of State, and therefore the suit was not maintainable without notice.

Per Jenkins, C.J.—This was not a case in which an exparte injunction should have been granted. The Courts should, if possible, always require notice, however short, to be given.

Suit to restrain the defendants by injunction from taking possession of the plaintiffs' property under colour of a certain award made by the Special Collector (defendant 3) and of the provisions of the City of Bombay Improvement Act (Bombay Act IV of 1898).

The suit was in the first instance filed against the Secretary of State and the Improvement Trust (defendants 1 and 2), but at the hearing the Special Collector was added as a party (defendant 3).

The plaint stated that on the 27th November, 1902, the plaintiffs received notices from the Special Collector (defendant 3) stating that certain premises therein mentioned were about to be

taken up by Government under Act I of 1894, and that the said premises were to be acquired under the said Act I of 1894. The said premises were the ancestral property of the plaintiffs and had been the family residence for some generations. The plaint then proceeded as follows:

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- 5. The plaintiffs, in pursuance of the notices received by the plaintiffs as aforesaid, attended before the Special Collector, being represented by their Solicitors, and pointed out to the Special Collector that he had no jurisdiction in the matter as no declaration had been published under the Land Acquisition Act, 1894. The Special Collector, however, held that the proceedings were regular, and subsequently at the same meeting held that further proceedings would be held under the City of Bombay Improvement Act, No. IV of 1898.
- 6. The plaintiffs proceeded before the Special Collector under protest, and they submit that the whole of the proceedings before the Special Collector were without jurisdiction and wholly irregular and void. The said proceedings began under the Land Acquisition Act, I of 1894, and subsequently proceeded under the City of Bombay Improvement Act, IV of 1898. The plaintiffs submit that no proceedings could be held under the Land Acquisition Act, 1894, because no declaration had been published under that Act, and they further submit that no proceedings could be held under the City of Bombay Improvement Act, No. IV of 1898, because the procedure under that Act had not been followed and no notice to the plaintiffs had been issued under it. Moreover, the plaintiffs had attended under notice that the land was about to be acquired under the Land Acquisition Act of 1894. The plaintiffs further say that they are not aware of any Act of the Legislature which entitles the Special Collector to act for portion of the case before him under the Act No. I of 1894 and then for the remaining portion of the case under the City of Bombay Improvement Act, No. IV of 1898.
- 7. The Special Collector proceeded with the case which was described by him as case No. 74, Scheme III, and proceeded to make his award thereon, on the principles laid down by the City of Bombay Improvement Act, No. IV of 1898, and refused to award the plaintiffs 15 per cent. for compulsory acquisition provided by the Land Acquisition Act, I of 1894, and in making his award paid no regard to the provisions of the Land Acquisition Act, No. I of 1894. The Special Collector awarded the plaintiffs the very inadequate sum of Rs. 7,876 only.
- 8. The Special Collector is about to take possession of the plaintiffs' premises and turn the plaintiffs and their families out of their home under colour of the above proceedings.
- 9. The plaintiffs in addition to the reasons hereinbefore appearing object to the aforesaid proceedings of the Special Collector and contend that the same are absolutely null and void and of no effect and without jurisdiction upon the ground that the Bombay Government has no power to enact the City of

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Bombay Improvement Act, No. IV of 1898, and has no power to legislate so as to give the Bombay Government or the Trustees for the Improvement of the City of Bombay any right to acquire the said premises of the plaintiffs compulsorily in the manner laid down by the said City of Bombay Improvement Act, No. IV of 1898.

- 10. The plaintiffs requested the Special Collector without prejudice to their contentions hereinbefore mentioned to refer the question of the amount of compensation for the determination of this Court, but the Special Collector refused to do so.
- 11. The Secretary of State will acquire and take possession of the plaintiffs' said premises under colour of the said award, and under colour of the powers alleged to be given to him by the City of Bombay Improvement Act, No. IV of 1898, and will upon compliance with the provisions of section 50 of that Act transfer the same to the Trustees for the Improvement of the City of Bombay.

The plaintiffs prayed as follows:

- 1. That it may be declared that the said proceedings before the special Collector and all other proceedings that have been taken to compel the plaintiffs to part with their said property against their will are illegal and absolutely null and void and of no effect and without jurisdiction.
- 2. That the defendants and each of them may be restrained by injunction from disturbing the plaintiffs in the possession of their said property and from taking possession of the same under colour of the said award and of the provisions of the City of Bombay Improvement Act, No. IV of 1898.

The plaint was filed on the 24th February, 1903, and on the same day a rule nisi for an injunction in terms of the above prayer was obtained by the plaintiffs with an *interim* injunction until the further order of the Court.

The rule was not argued, but it was arranged that the suit should be heard at an early date by two Judges.

No written statement was required or filed, and the case came on for hearing before Jenkins, C.J., and Batty, J.

Scott (Advocate General) and Jardine for the Secretary of State (defendant 1).

Scott (Advocate General) and Loundes for the Trustees (defendant 2).

Loundes and Binning for the Special Collector (defendant 3).

The following issues were raised on behalf of the first defendant:

(1) Whether having regard to the provisions of section 424 of the Civil Procedure Code (Act XIV of 1882) this suit is maintainable.

(2) Whether the proceedings before the Special Collector referred to in the plaint are void for any of the reasons stated in the plaint.

(3) Whether the plaintiffs are entitled to the injunction claimed by them.

Counsel for the Trustees (defendant 2) joined in the above second and third issues and raised the following fourth issue:

(4) Whether the plaint discloses any cause of action against them.

Inverarity and Stanhope Bayley for plaintiffs: -As to the first issue, we say that section 424 of the Civil Procedure Code (Act XIV of 1882) does not apply to suits for injunctions. To require two months' notice of a suit necessary to prevent an immediate threatened wrong would be a denial of justice, for the wrong would be done before the suit could be filed. In this case the plaintiffs would have been ejected and their house demolished within the two months and no remedy would be left to them. The words of section 424, no doubt, are wide enough to cover all classes of suits, but the Courts must read into the section the additional words "except in cases of necessity": Bateman v. Poplar District Board of Works(1); Flower v. Local Board of Low Leyton(2); Municipality of Parola v. Lakshmandas.(3) case of Secretary of State v. Rajluckith may be cited against me. But as to how far judgments are authorities, see Lord Halsbury's observations in Quinn v. Leathem. (5) It is probable that, in section 424, the comma after the first mention of the Secretary of State in Council has crept in by inadvertence and should be disregarded. It did not appear in the corresponding section of the previous Code (Act X of 1877). If this comma were not there, the words would have a narrower application The punctuation of an Act is no part of it: Duke of Devonshire v. O'Connor(6); Claydon v. Green.(7)

As to the merits, we say the City of Bombay Improvement Act is invalid, being *ultra vires* of the Bombay Legislature. This Court has power to inquire into the validity of an Act: Empress

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^{(1) (1886) 33} Ch. D. 360.

^{(2) (1877) 5} Ch. D. 347, 349.

^{(3) (1900) 25} Bom. 142.

^{(4) (1897) 25} Cal. 239, 240.

^{(5) (1901)} Ap. Ca. 495 at p. 50G.

^{(6) (1890, 24} Q. B. D. 468 at p. 478.

^{(7) (1868)} L. R. 3 C. P. 511 at p. 522.

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v. Burah.(1) Previously to 1834 the Bombay Legislature had certain legislative powers, but in that year it was deprived of them and until 1861 it had no powers of legislation at all.(2) By the Indian Councils Act (Stat. 24 & 25 Vict., c. 67), section 42, certain limited powers were given to it. It was to legislate "for the peace and good government" of the Presidency and for that purpose might repeal and amend any laws previously passed by any Indian authority so far as they affected the Presidency. But it was not to legislate so as to affect that Act or any other Act of Parliament then or thereafter to be in force. Next came the Indian Councils Act, 1892 (Stat. 55 & 56 Vict., c. 14), of which section 6 defines "province" and section 5 extends the power to repeal or amend laws. What is the combined effect of these two statutes from which all the powers of the Bombay local Legislature are derived? They give very limited power to legislate for the province: they do not allow legislation for part of the province, nor do they allow legislation for classes of persons or for individuals.

The Bombay Legislature in passing the Improvement Act assumed powers of legislation which the above Acts did not confer and which it therefore does not possess. First, it creates a person or corporation called the Board of Trustees. It has no power to do that. Only the Crown can create a corporation: see Encyclopædia of the Laws of England, tit. "Corporation," Vol. 3, page 437. Then it empowers this person or corporation to acquire land in a manner different from that in which, by the Land Acquisition Act, the Supreme Legislature had authorised land to be acquired and on exceptionally advantageous terms. Thus it legislates for a person and not for the province, which it cannot do; and it alters or amends the Land Acquisition Act in favour of the new person or corporation only, and with respect only to the City of Bombay, leaving the Act in full force and unaltered in the rest of the Presidency.

Next, the Improvement Act (section 48) creates a new Court and interferes with the functions and jurisdiction of the High

^{(1) (1878) 4} Cal. 172; 3 Cal. 63.

⁽²⁾ See speech of Sir F. Stephens in Proceedings of the Governor Ga cral's Legislative Council, Vol. 9, page 157.

Court. The Indian Councils Acts of 1861 and 1892 give the local Legislature no power to do that. Only the Governor General in Council can legislate for Courts of Justice: see section 22 of the Indian Councils Act, 1861, and section 44 of the Letters Patent, 1865. The Councils Act, 1892 (55 & 56 Vict., c. 14), leaves that exclusive power unaltered, for (section 5) it makes the powers of the local Legislature "subject to the provisions of the Councils Act, 1861." The Bombay Legislature exceeded its power in passing the Municipal Act (Bombay Act III of 1888) which affected Courts of Justice and consequently Act XII of 1888 was found necessary in order to validate it. That is a legislative recognition of the fact that the local Legislature cannot legislate for Courts of Justice.

The Improvement Act legislates for Courts of Justice in this way. It not merely creates a new Court (section 48) to deal with cases in which land is compulsorily acquired which it has no power to do, but it takes away the right of appeal to the High Court which is given in such cases by section 54 of the Land Acquisition Act (I of 1894) (see section 47 and schedule A of the Improvement Act). By section 18 of the Land Acquisition Act I of 1894 (which is incorporated in the Improvement Act) a right is given to refer to this Court (see clause d, section 3). From the decision on such reference there would be an appeal under. clause 15 or 16 of the Letters Patent, 1865. But all the rights thus given to persons whose land is acquired for public purposes are taken away by the Improvement Act. This Act thus withdraws from the High Court the jurisdiction which it has had under the Land Acquisition Act (I of 1894) and it allows no appeal to the High Court except by permission of the President of the new tribunal (see clause 11 of section 48). In section 49 the tribunal is called a Court. In section 48 it is "deemed to be the Court." We submit that the Bombay Legislature can neither create a Court nor constitute a tribunal to exercise the functions of a Court. If it can do this it might constitute a tribunal to exercise the functions of the High Court and thus supersede the High Court altogether. The new Act ordains that a certain class of cases arising between certain litigants shall be decided by this tribunal. If it can do this it could pass an Act

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that all questions of contract arising, e.g., between Parsis, should be decided by such a tribunal.

Again, section 104 of the Improvement Act is ultra vires, for it prevents the application of the ordinary law of limitation. If in the present case the plaintiffs are ejected by the Collector, they would have twelve years under the Limitation Act within which to sue; but section 104 only gives them six months.

Again, section 31 is ultra vires. It enables the Board of Trustees to take land not required for any public purpose, but any land which may "be affected" by a street scheme. The effect of this is to enable the Board to speculate in land.

Next, can it be said that this Act is " for the peace and good government" of the City of Bombay? Its procedure is oppressive. After a notification has been issued under section 27, the Board need take no further steps for years. They are bound by no limit of time. In the present case the notification was issued in December, 1898, and no further steps were taken until the 9th November, 1902. Once a notification is issued the owner cannot sell his land, for of course no one will buy. And the compensation is fixed as of the date of the notification. Executors cannot realize their testator's property. Or suppose the case of a man who has just bought land for building. He mortgages it for a large sum. The Board issues a notification which includes his property. The result is he cannot sell. He dares not build (see section 49. clause 2) and yet he must pay the interest on his mortgage-debt. Thus the operation of the Act "for the good government" of Bombay ruins him.

Again, as to compensation, section 15 of the Land Acquisition Act, I of 1894, (incorporated by section 47 of the Improvement Act) states the principles by which the Collector is to be guided in awarding it. But while that section directs him to observe the provisions of sections 23 and 24 of the Land Acquisition Act, schedule A of the Improvement Act excepts certain clauses of these sections. Then if the owner goes before the tribunal, that Court awards compensation on different principles (see section 49) and by different rules from those applied by the Collector.

On the above grounds we contend that the Improvement Act is invalid.

Next, we contend that assuming the Improvement Act to be valid, its provisions were not in this case observed. Where by law power is given to one person to acquire compulsorily the land of another, the very letter of the statute must be followed: Rew v. Oroke(1); Mayor of Liverpool v. Chorley(2); North Shore Railway Company v. Pion(3); Herron v. Rathmine, S.c., Improvement Commissioners.(4) We say the letter of the law has not been observed in this case and the proper procedure has not been followed. By section 47 of the Improvement Act certain portions of the Land Acquisition Act are incorporated. They are made part of the new Act. The notices, therefore, should have been issued under the Improvement Act and it should have been stated that the land was to be acquired under that Act. But the notice is stated to be issued under the Land Acquisition Act (I of 1894) and the plaintiff was informed that the land was to be taken by Government (see section 9 of Act I of 1894). The declaration issued also was not in proper form.

The Trust by the fourth issue suggest that they are not proper parties to this suit. But it is they who issue the notification. They negotiate with the owner of the land (see section 50). They are the parties chiefly interested; therefore under section 42 of the Specific Relief Act (I of 1877) they are rightly made parties to this suit.

Scott (Advocate General) for defendants 1 and 2:—The position of the Secretary of State, having regard to the provisions of statute 21 & 22, Vict., c. 106, sections 65 and 67, is discussed in Kinlock v. Secretary of State for India (5); Secretary of State v. Rajlucki. (6) It is clear that he cannot be sued unless notice has been given (section 424 of the Civil Procedure Code). Section 104 of the Improvement Act does not apply to the Secretary of State, as the Crown is not mentioned: Secretary of State v. Mathurubhai.

The Improvement Act is not ultra vires of the Bombay Legislature under 24 & 25 Vict., c. 67, sections 42 and 43. It 1903.

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^{(1) (1774)} Cowp. 26.

^{() (1852) 2} DeG. M. & G. 852.

^{(3) (1589) 14} Ap. Ca. 612 p. 624.

^{(4) (1892)} Ap. Ca. 498 p. 523.

^{(5) (1880) 15} Ch. D. 1 at p. S.

^{(6) (1898) 25} Cal. 239.

^{() (1889) 14} Bom. 213.

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has a general power of legislation with certain specific exceptions. It can legislate for persons as well as places within the Presidency. There are only two reported cases in which its powers have been challenged: Premshankar v. The Government of Bombay⁽¹⁾; Collector of Thana v. Bhaskar.⁽²⁾ Its power of amendment and repeal is co-extensive with its power of original legislation: Stat. 55 & 56 Vict., c. 14, section 5. The Governor General in Council can create corporations and constantly does so, e.g., for the purpose of allowing public bodies, e.g., Municipal bodies and companies, &c., to sue and be sued. No doubt it is a prerogative of the Crown, but Parliament with the consent of the Crown has given the power to the Indian Legislature.

The purposes of the Improvement Act could not have been effected by the Land Acquisition Act (I of 1894). It was necessary that the powers given by the latter Act should be extended, and the new legislation was for the "good government" of Bombay. Sanitary purposes fall within that description. The methods adopted by the Improvement Act are similar to these adopted in the Housing of Working Classes Act (Stat. 53 & 54 Vict., c. 70), on which it is to a large extent modelled: see Ilbert, page 263 et seq.; see section 20 of Stat. 53 & 54 Vict., c. 70; compare section 47 of the Improvement Act. Act I of 1894 is not repealed or amended, but it is applied by the Trust Act. The fact that certain provisions of the Improvement Act may produce hardship raises a question of policy with which this Court cannot deal. As to the delay complained of, compare the English Act (53 & 54 Vict., c. 70), section 20, sub-section 2.

The Improvement Act does not interfere with the jurisdiction of the High Court. The effect of the Act is to give rise to a new class of cases, and a new tribunal is created to deal with them. If, however, any of the provisions dealing with the new tribunal are ultra vires, that circumstance would not invalidate the whole Act.

[Jenkins, C.J.:—Would the Legislature have passed an Act for taking land if it had been aware that the provisions which it contained for ascertaining the compensation to be paid were invalid?]

⁽I) (1871) 8 B. H. C. Rep. 195 at pp. 197-9. (2) (1884) 8 Bom. 264.

The question in this case is as to the taking of the land. The point of compensation arises after the land is taken.

[Jenkins, C.J.:—But is not the Act an Act to take up land on payment of compensation? Is it not an expropriation Act?]

I submit the scheme of the Act is to acquire the land. The land is taken, whatever the amount of compensation may be. The mode of ascertaining the compensation may be defective, but that does not invalidate the Act so far as taking the land is concerned. In England the law is different. It is on payment that the land vests: Statute 53 & 54 Vict., c. 70. In India it is not so: see Rules and Regulations III of 1812, articles 27 and 29; Bengal Regulation I of 1824; Bombay Act XXVIII of 1839, section 16; Act VI of 1857, section 8, which is re-enacted in the Land Acquisition Act of 1870 and again in Act I of 1894. So it appears that in India, as soon as the first step to acquire the land is taken, the property vests in Government. The question as to compensation and the right of appeal does not affect the vesting.

But I submit that the provisions of the Improvement Act as to the tribunal are not ultra vires.

[Jenkins, C.J.:—The first question is whether the tribunal is a Court. If it is, then the local Legislature cannot interfere with the High Court's right of supervision. If it is not a Court, it is merely a body of arbitrators, and there is no appeal to the High Court.]

It is called a Court in section 49. I submit it is a Court, and the Legislature has power to create it, just as it created Mamlatdars' Courts (Bombay Act III of 1876) and Revenue Courts (Bombay Act II of 1876), the latter of which gives a right of appeal to the High Court. So long as no statutes are affected, the local Legislature has power to legislate. Neither the Charter nor the Charter Act (Stat. 24 & 25 Vict., c. 104) is affected by the Improvement Act. The new legislation only gives additional work to the High Court. It does not interfere with its existing powers.

As to the merits of the case, we say the procedure was right. The notices were good, having regard to section 47 of the Improvement Act, which provides that Act I of 1894 is to

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regulate the procedure. The notices were issued under section 9 of the Act (I of 1894). There is no prescribed form of notice, but the notices given contained all that was necessary. This Court will not regard mere technicalities. The declaration also was good under section 29 of the Improvement Act.

Lowndes for the second defendant:—The notice and declaration need only state the limits of the land and the purposes for which the land is needed: see section 6 of Act I of 1891; section 29, clause (b), of the Improvement Act.

We submit that the tribunal is a Court. Section 48 of the Improvement Act does not prevent the High Court from making rules for the tribunal. If the tribunal is a Court, then there is an appeal from it to the High Court.

[Jenkins, C.J.: —Do you say that an appeal would lie whether a certificate is given or not?]

There may be a question as to the cases in which an appeal would lie. That point would, no doubt, have to be decided.

As to the vesting of the land, it is clear that the policy of the Act is to take the land quite independently of the question of compensation. That appears from section 17 of Act I of 1894, and the invalidity of the section dealing with the latter would not affect the validity of the clause dealing with the former.

Inverarity in reply:—If the Improvement Act does not repeal, alter or amend Act I of 1894, then it must have been enacted under the powers given by the Councils Act, 1861. But that Act forbids the local Legislature to enact anything inconsistent with prior Acts of the Government of India. Now Act I of 1894 was the only Act under which land could be taken for a public purpose, and it provided for compensation being given in a particular way and paid out of a specified fund (see section 6 of Act I of 1894). That was the law in force. Whence does the local Legislature obtain power to enable a corporation to acquire land in a different way? Act I of 1894 is repealed, altered or amended in favour of the Trust. If the Improvement Act does not repeal or amended it, then the Act is clearly ultra vires.

If the provisions for ascertaining compensation are invalid the whole Act fails, just as a good charitable gift may fail when it

is part of an invalid scheme: Tudor on Charity, page 47. The powers of the Bombay Legislature were challenged in Reg. v. Reay. (1) That Legislature has no power under the Councils Act, 1861, to legislate for Courts of Justice. Probably the Mamlatdars' Courts Act and the Land Revenue Act are invalid, but the point has never been raised.

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JENKINS, C.J.:—In the year 1898 certain improvements were projected in the City of Bombay, and an Act called the City of Bombay Improvement Act, 1898, was passed, giving to a Board thereby constituted certain powers with a view to carry these improvements into effect.

On the 25th of September, 1902, there was published in the Bombay Government Gazette a declaration purporting to be in pursuance of the Act, stating that the Governor of Bombay in Council had sanctioned a street scheme made by the Trustees for the Improvement of the City of Bombay under the provisions of the Act (that being the style of the Board thereby constituted) and that certain lands, including those in suit, were "needed to, be acquired by the said Trustees for the purposes of executing the said street scheme" and were required for a public purpose.

On the 27th November, 1902, the plaintiffs received notices addressed to Pandurang Nilaji, their deceased father, and also to each of them in the following terms:

Notice is hereby given that the undermentioned piece of ground, with the building thereon erected, situated within the limits of the Registration District of Bombay, in the Island of Bombay, and recently marked out and measured, is about to be taken by Government for a public purpose, viz., for the street scheme No. III from Elphinstone Bridge to Queen's Read proposed by the Trustees for the Improvement of the City of Bombay, under Act I of 1894, in accordance with a declaration, dated 22nd September, 1902, published in the Bombay Government Gazette of the 25th September, 1902. If you have any interest in this land and building, or are entitled to act for person so interested, you are hereby called upon to appear personally or by agent on Friday, the 12th December, 1902, at 11 A.M., at the office of the Special Collector, Bombay, in the Chartered Bank New Buildings, opposite Queen's Statue, on Esplanade Road, to state and prove by documents the nature of such interests in the land or building, and the amount and particulars of any claim you may wish to prefer for the same.

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All that piece or parcel of land or ground, together with buildings erected thereon, situate at 7th Khetwady Lane, assessed by the Collector of Land Revenue under New No. 9238 and New Survey No. 5459 and by the Collector of Municipal Rates and Taxes under D Ward, No. 1967, and street No. 13—15, bounded on the north by ; on the south by the property of Baboo Deoji, a Bagmali; on the west by the 7th Khetwady Lane; and on the east by the property of Jeewandas Ebji Sivji, containing an approximate area of 233 square yards, and is now in the occupation of Pandurang Nilaji.

(Signed) J. McNeill, Special Collector.

Accompanying each was a document to the following effect:
IN THE MATTER OF THE LAND ACQUISITION ACT OF 1894.

NOTICE TO CLAIMANTS FOR PROPERTIES TO BE ACQUIRED UNDER THE ABOVE ACT.

Special Collector's Office: Bombay, 27th November, 1902.

To Mr.

With reference to the accompanying notice, I beg to inform you that in order to facilitate the making of awards in the large number of cases now pending before me under the above Act, the following procedure will, so far as practicable, be followed:

- 1. On the date and at the hour mentioned in the accompanying notice, you should appear personally or by duly authorised agents and should produce your documents of title and bills for Municipal taxes and Government and Fazendari or other rents paid by you and all other documents in support of your claim, together with a statement in writing of the amount claimed in respect of the property to be acquired.
- 2. You should also produce on the above date, under section 10 of the Land Acquisition Act, 1894, a statement in writing signed by you giving the following particulars as far as practicable:

The name of every other person possessing any interest in the land or any part thereof as co proprietor, sub-proprietor, mortgagee, tenant, or otherwise, and of the nature of such interest, and of the rents and profits (if any) received or receivable on account thereof for three years next preceding the date of the statement. Should any of your documents of title be in the hands of a mortgagee or other third parties, you should obtain a sub-pæna from me for the production by any such third parties of those documents.

3. If you wish to support your claim by a valuation made by an Engineer, Surveyor or others, you will be required to be prepared with such valuation with your other papers on the date mentioned in the accompanying notice, and an adjournment will not be granted on the ground that such valuation is not yet completed or that the matter has recently been placed in the hands of professional advisers, unless it be proved to my satisfaction that the delay was unavoidable.

4. In the event of the amount claimed in respect of any property not being considered reasonable, the inquiry in respect of such property will either proceed or will be adjourned to some subsequent date, when you must be prepared to offer any evidence you may consider necessary in support of your claim.

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(Signed) B. H. JAYAKAR, for Special Collector.

On the 23rd of February, 1903, Mr. McNeill, one of the Special Collectors under the Improvement Act, having made an award of the compensation which in his opinion should be allowed for the premises, gave to the plaintiffs notice that they should hand over possession of the property on the 27th of that month.

On the 24th of February the plaintiffs commenced this suit against the Secretary of State for India in Council and the Trustees for the Improvement of the City of Bombay, praying as follows [His Lordship read the prayers, supra, page 428].

The proceedings to obtain possession are resisted by the plaintiffs on the ground, first, that the local Legislature had no power to pass the City of Bombay Improvement Act, and secondly, that if they had, the procedure prescribed by that Act was not observed.

At the hearing the following issues were raised [His Lordship read the issues, *supra*, page 429].

The original defendants were the Secretary of State for India in Council and the Trustees for the Improvement of the City of Bombay; the case, however, had proceeded but a short way when, on the plaintiffs' application, Mr. McNeill, the Special Collector, was added as a party. He raised the same issues as the Improvement Trustees.

It will be seen that the really important question in the case is, whether the City of Bombay Improvement Act was within the powers of the local Legislature, and that I propose first to consider. It is a legitimate subject of discussion in this Court, for the Governor of this Presidency in Council is a subordinate Legislature, whose authority in the way of law-making is subject to and dependent upon the Acts of Parliament, from which their legislative powers are derived, so that we have the right, and are charged with the duty, of deciding judicially, whether the impugned legislation is within the scope of their authority.

Hart v. Secretary of State for India. It would be to no purpose now to trace the history of the local Government's legislative powers beyond the Statute 3 & 4 Will. IV, c. 85, whereby the several local Legislatures were superseded and one central legislative authority was established. Later, it was determined to restore to the Presidencies of Madras and Bombay the power of making laws and regulations within defined limits, and the Indian Councils Act, 1861, was passed.

The sections of that Act which deal with the subject are 42 and 43, which are in these terms:

42. The Governor of each of the Presidencies in Council shall have power, at meetings for the purpose of making laws and regulations as aforesaid, and subject to the provisions herein contained, to make laws and regulations for the peace and good government of such Presidency, and for that purpose to repeal or amend any laws and regulations made prior to the coming into operation of this Act by any authority in India, so far as they affect such Presidency:

Provided always that such Governor in Council shall not have power of making any laws or regulations which shall in any way affect any of the provisions of this Act, or of any other Act of Parliament in force or hereafter to be in force in such Presidency.

43. It shall not be lawful for the Governor of either of the aforesaid Presidencies, except with the sanction of the Governor General previously communicated to him, to make regulations or take into consideration any law or regulation for any of the purposes next hereinafter mentioned; that is to say—

(1) affecting the public debt of India, or the customs duties, or any other tax or duty now in force and imposed by the authority of the Government of India for the general purposes of such Government:

(2) regulating any of the current coin, or the issue of any bills, notes or other paper currency:

(3) regulating the conveyance of letters by post office or messages by the electric telegraph within the Presidency:

(4) altering in any way the Penal Code of India, as established by the Act of the Governor General in Council, No. XLV of 1860:

(5) affecting the religion or religious rites and usages of any class of Her Majesty's subjects in India:

(6) affecting the discipline or maintenance of Her Majesty's Military or Naval forces:

(7) regulating patents or copyrights:

(8) affecting the relations of Government with foreign princes or States:

Provided, always, that no law or provision of any law or regulation which shall have been made by any such Governor in Council and assented to by the Governor General as aforesaid, shall be deemed invalid only by reason of its relating to any of the purposes comprised in the above list.

This Act was amended by the Indian Councils Act of 1892, which by section 6 provides:

6. In this Act-

The expression "Local Legislature" means (1) the Governor in Council for the purpose of making laws and regulations of the respective provinces of Fort St. George and Bombay; and (2) the Council for the purpose of making laws and regulations of the Lieutenant-Governor of any provinces to which the provisions of the Indian Councils Act, 1861, touching the making of laws or regulations have been or are hereafter extended or made applicable:

The expression "province" means any Presidency, division, province or territory over which the powers of any local Legislature for the time being extend.

For the purpose in hand it is in these Acts, subject to the limitation imposed by 24 & 25 Vict., c. 104, that the constitution of the local Legislature is to be found.

I now will pass on to the Indian legislation which bears on the questions at issue in this suit. In 1894 there was passed by the Governor General in Council Act I of that year—an Act to amend the law for the acquisition of land for public purposes and companies,—and it was this Act of the Supreme Legislature that, at the passing of the City of Bombay Improvement Act of 1898 (to which I will in future refer as the Improvement Act), regulated the compulsory acquisition of land. Proceeding to the Improvement Act, we find that it recites as follows [His Lordship read the preamble to the Act]. Section 1 provides that it shall extend "only to the City of Bombay" and section 3 that:

The duty of carrying out the provisions of this Act shall, subject to such conditions and limitations as are hereinafter contained, be vested in a Board, to be called "The Trustees for the Improvement of the City of Bombay," and such Board, hereinafter referred to as "the Board," shall be a body corporate and have perpetual succession and a common seal, and shall sue and be sued by the name first aforesaid.

Chapter III deals with the duties exercisable under the Act in relation to the schemes contemplated by it and the acquisition of the land required for the purposes of the same.

Now it will have been noticed that section 3 enacts that the Board will be a body corporate and have perpetual succession. This has given rise to the argument before us that it is beyond

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the powers of the Bombay Legislature to create a corporation. In England the Sovereign's consent (express or implied) is necessary to the creation of a corporation by reason of the Crown's prerogative, and even a statutory corporation is no exception to this, as of the constituting Act the royal assent is an indispensable ingredient (Bacon's Abridgment: Corporation B.; Stephen's Blackstone, Book 1V, Part III, Chapter I; and Chitty's Prerogative). That the Crown's prerogative extends here is recognised by section 24 of the Indian Councils Act, 1861.

It is, however, unnecessary to discuss the power of the local Legislature to create a corporation, for even if that power does not exist, still that would not make the Improvement Act ultra vires in relation to the matters at issue in this suit; for were the Board not legally incorporated, that would not defeat the purposes of the Act in an essential particular.

Apart from this, however, it is argued that the Improvement Act is beyond the powers of the local Legislature; that the compulsory acquisition of land in India is governed by the Land Acquisition Act; and that the Governor in Council had no power to depart from the principles and methods of that Act.

In the first place it is contended that so far as the Improvement Act can be regarded as a repeal or amendment of the Land Acquisition Act, its validity must be judged by section 5 of the Indian Councils Act of 1892, under which the local Legislature of any province can only repeal or amend as to that province. That, it is said, does not allow of an amendment or repeal affecting a particular corporation in a particular locality. In my opinion this argument has no force: the reference to the province is merely for the purpose of defining the limits of legislative operation and in no way imposes the condition that all legislation should affect the whole of that area. To accept the plaintiffs' argument would be to impose a restriction on local legislation not required by the words of the Act, and productive of great practical inconvenience.

Next, it has been contended that there has been no repeal or amendment of the Land Acquisition Act, and that the compulsory acquisition of land must, therefore, be governed by that Act. But so far as the Improvement Act is inconsistent with

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the Land Acquisition Act, it is by implication a repeal or amendment of it. But in fact it is by no means clear that the Land Acquisition Act is touched by the Improvement Act, for it is limited in its operation to those cases in which the compensation to be awarded is to be paid by a company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority. But from section 3 of the Land Acquisition Act it is manifest that the Board, even if legally incorporated, is not a company within the meaning of the Act, while the compensation is not payable out of the public revenues or a fund of the character prescribed.

Then stress has been laid on the provision in the Indian Councils Act, 1861, that the Governor in Council is only empowered to "make laws and regulations for the peace and good government" of the Presidency. This legislation, it is said, does not comply with this condition, for it is calculated to cause discontent. Clearly this is a question into which we cannot go: it involves questions of policy, which it is outside our jurisdiction to discuss.

This brings me to the question whether the Act is vitiated by anything contained in section 48. A Tribunal consisting of a President and two Assessors is thereby appointed to perform the functions of the Court under the Land Acquisition Act, and by the 11th sub-section it is enacted that:

In any case in which the President may grant a certificate that the case is a fit one for appeal, there shall be an appeal to the High Court from the award or any part of the award of the Tribunal.

The scheme, therefore, of the Act in relation to ascertaining the compensation to be paid on the compulsory acquisition of land is, that the Collector in the first place is to award the compensation, which in his opinion should be allowed (see section 11 of the Land Acquisition Act); but any person interested, who has not accepted an award so made, may require that the matter be referred to the determination of the Tribunal of Appeal (section 18 of the Land Acquisition Act). From the award of the Tribunal there is, if the President of the Tribunal grants the necessary certificate, an appeal to this Court.

The provision in favour of this last appeal has hitherto proved illusory, because on no occasion has the President granted

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a certificate; still it is fair to assume that the Legislature regarded the provision for appeal to this Court as a part of the Act, that might have some useful operation. The question, therefore, arises whether the local Legislature had power to grant an appeal to this Court dependent on the will of the President of the Tribunal, and if not, to what extent the validity of the Act is thereby affected.

To answer this question we must first consider whether the Tribunal of Appeal is a Court; and this depends upon whether the Tribunal was intended to be a Court, and, if so, whether the creation of a Court was within the powers of the local Legislature.

In considering whether the Tribunal of Appeal is a Court, it is important in the first place to observe what is its constitution. It consists of a President and two Assessors, of whom only the President need have any legal training: the award of the majority (except on points of law) prevails: the President and one Assessor are appointed by the Government, the other Assessor by the Corporation, by which is presumably meant the Municipal Corporation of Bombay: the members of the Tribunal are appointed for one year and are eligible for reappointment: they are removable by Government for inability. misbehaviour or other good and sufficient cause: the President alone has power to make rules for the conduct of the Tribunal subject to the sanction of the Government, while under the High Courts Act of 1861 (Stat. 24 & 25 Vict., c. 104), section 15, it is the High Court that is empowered to frame rules of practice for subordinate Courts: the Act does not purport to constitute the Tribunal a Court, but provides that it shall perform the functions of the Court under the Land Acquisition Act, and shall be deemed to be the Court: the President is deemed to be the Judge, and the Tribupal's award (subject to the right of appeal I have mentioned) is final. Can it reasonably be said that a body so constituted is I think not; it appears to me that the a Court of Justice? manifest purpose of the Legislature was to create a Tribunal that should not be a Court, but a body free from the control and superintendence of this Court, except so far as intervention by way of appeal might be sanctioned by its President, and I am of opinion that the object has been attained.

Under these circumstances it is unnecessary to consider whether the creation of a Court is an unauthorised invasion of the Crown's prerogative (see section 24 of the Indian Councils Act, 1861, and Bell v. Municipal Commissioner for the City of Madras⁽¹⁾), or whether the creation of a new Court within the limits of this Presidency is within the legislative powers of the Governor in Council.

But if the Tribunal was not a Court, what power was there to give the limited right of appeal to this Court that section 48 (11) of the Improvement Act proposes to provide?

Apart from special jurisdiction in relation to particular matters derived from the authorised legislation of the Governor General in Council, the civil jurisdiction of the High Court is (1) ordinary original, (2) extraordinary original, or (3) appellate and revisional. Now this limited right of appeal under the Improvement Act does not come within either of the last two heads of jurisdiction: the appellate and revisional jurisdiction can only come into play when there has been a decision of a Court—a condition which ex hypothesi does not exist here,—while the extraordinary civil jurisdiction obviously can have no application. Can it then be said that our ordinary civil jurisdiction is of any avail? I think not. The conditions are so widely different from those under which our original jurisdiction is exercised that, in my opinion, they do not permit of our dealing with the case as falling within that jurisdiction.

But if this be so, the Improvement Act cannot confer on us this jurisdiction, because the local Legislature has no power to control or affect by their Acts the jurisdiction or procedure of the High Court, as that power rests with the Imperial Parliament and with the Legislative Council of the Governor General (see 24 & 25 Vict., c. 104).

What then is the result of this defect in the prescribed machinery for ascertaining the compensation payable under the Improvement Act? No authority has been cited to us that throws light on this question; but on a consideration of all the circumstances we think that the whole Act is not thereby invalidated. It may be that in some cases the several provisions of an Act are so

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closely connected and interdependent that invalidity in one would necessarily involve the invalidity of the rest; but that does not seem to me to be the case here. Though the machinery for ascertaining compensation may be defective so far as it provides for an appeal to this Court, I do not think that as a consequence the provision for taking possession (with which alone we are concerned in this suit) must be treated as beyond the powers of the Bombay Legislature.

The Colonial Laws Act, 1865, of course has no application to the present case, but the third section of that Act furnishes us with an interesting illustration of the principles on which the English Parliament has proceeded under similar circumstances. It is by that section provided that "any Colonial law, which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate or repugnant to any order or regulation made under authority of such Act of Parliament or having in the colony the force and effect of such Act, shall be read subject to such Act, order or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."

If we apply this principle to the Improvement Act, then the provisions for taking possession are not void.

If it be said that the Improvement Act would not have been passed in its present form, had it been realised that the provision for a qualified right of appeal to this Court was of no effect, we can only say that here the discussion enters on a field of speculation closed to us; but no doubt the matter will receive due attention in the proper quarters and such reparation made as the circumstances of the case demand.

It may here be noted that even if it be that the Improvement Act has failed to carry out entirely the expressed wish of the Legislature, this would equally, perhaps, still more have been the case had we been able to hold the Tribunal to be a Court, for that would have attached the consequence of superintendence by this Court, which it manifestly was intended to avoid.

Having thus decided that the provision for taking possession is not void, I will now proceed to deal with the objection that the procedure prescribed by the Act has not been followed.

Section 32 provides:

Upon completion of a street scheme, the provisions of sections 27, 28 and 29 shall with all necessary modifications be applicable to the scheme in the same manner as if the scheme were an improvement scheme.

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It is not suggested that the provisions of sections 27 and 28 have not been complied with. Section 29 (1) enacts that—

On receipt of the sanction of Government, the Chairman shall forward a declaration for notification under the signature of a Secretary to Government stating the fact of such sanction and that the land proposed to be acquired by the Board for the purposes of the scheme is required for a public purpose.

I have already referred to this declaration, and I cannot see in what respect it fails to comply with the provisions of the Act. It states (a) that the Governor in Council has sanctioned the scheme; (b) that the lands are required for a public purpose; (c) the purpose for which they are needed, the limits and approximate area; and (d) the place where a plan may be inspected; in this it has fulfilled the requirements of the Improvement Act.

Then complaint is made of the notices given. I have already read one set of these notices, and for the purpose in hand that will suffice, as the other sets are in identical terms.

These documents, it will be seen, refer only to the Land Acquisition Act, making no direct mention of the Improvement Act; this, it is urged, is a failure to observe the requirements of the law.

It will be instructive to see how the reference to the Land Aequisition Act crept in. Portions of that Act are by section 47 incorporated into the chapter of the Improvement Act which deals with the acquisition of land; that section runs as follows:

- 47. Notwithstanding anything contained in the Land Acquisition Act, 1894, (in this and the next succeeding section referred to as the "said Act") the said Act shall not, except to the extent set forth in Schedule A, apply to the acquisition of land under this Act, but the said Act shall, to the extent set forth in the said schedule, regulate and apply to the acquisition of land otherwise than by agreement and shall for that purpose be deemed to form part of this chapter in the same manner as if enacted in the body hereof, subject to the provisions of this chapter and to the provisions following (namely):
- (1) A reference to any section of the said Act shall be deemed to be a reference to such section, as modified by the provisions of this chapter, and the expression "land," as used in the said Act, shall, in addition to the meaning

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- included therein under clause (a) of section 3 of the said Act, be deemed, for the purposes of this Act, to include rights created by legislative enactment over any street; and clause (b) of section 3 of the said Act shall, for the purposes of this Act, be read as if the words "or if he is the owner any right created by legislative enactment over any street forming part of the land" were added after the words "affecting the land";
- (2) In the construction of sub-section (2) of section 4 of the said Act and the provisions of this chapter, the provisions of the said sub-section shall, for the purposes of this Act, be applicable immediately upon the passing of a resolution under section 23, 30 or 38, and the expression "Local Government" shall be deemed to include the Board, and the words "such locality" shall be deemed to mean the locality referred to in such resolution;
- (3) In the construction of the sections of the said Act deemed to form part of this chapter and the provisions of this chapter, the publication of a declaration under section 29, 32, or 39 shall be deemed to be the publication of a declaration under section 6 of the said Act;
- (4) In the construction of section 50, sub-section (2), of the said Act, and the provisions of this chapter, the Board shall be deemed to be the local authority or company concerned.

Turning to the schedule, we find that the portions of the Land Acquisition Act which regulate the acquisition of land under the Improvement Act are Part I except clauses (d), (e) and (f) of sub-section 3, and Part II except sub-section 1 of section 4, section 6, and sub-section 2 of section 17.

Now the section which deals with notices is the 9th, which provides:

- (1) The Collector ishall then cause public notice to be given at convenient places on or near the land to be taken, stating that the Government intends to take possession of the land, and that claims to compensation for all interests in such land may be made to him.
- (2) Such notice shall state the particulars of the land so needed and shall require all persons interested in the land to appear personally or by agent before the Collector at a time and place therein mentioned (such time not being earlier than fifteen days after the date of the publication of the notice) and to state the nature of their respective interests in the land and the amount and the particulars of their claims to compensation for such interests, and their objections (if any) to the measurements made under section 8. The Collector may, in any case, require such statement to be made in writing and signed by the party or his agent.
- (3) The Collector shall also serve notice to the same effect on the occupier (if any) of such land and on all such persons known or believed to be interested therein, or to be entitled to act for persons so interested, as reside or have agents authorised to receive service on their behalf, within the revenue district in which the land is situate.

(4) In case any person so interested resides elsewhere and has no such agent, the notice shall be sent to him by post in a letter addressed to him at his last known residence, address or place of business and registered under Part III of the Indian Post Office Act, 1866.

Nothing has been said before us as to the public notice prescribed by the Act: nor has any suggestion been made that it was not in order: therefore I assume that it was not open to objection. The argument before us has been limited to the insufficiency of the notices I have read.

Now sub-section 3 enacts that the notice should state that the Government intends to take possession of the land. it is true, does not use those precise words, but it says that the land is about to be taken by Government, and that is substantially the same thing. Next, the notice should state that claims for all interests in the lands should be made to the Collector. With this too there has been, if not a verbal, at any rate practical compliance. In fact, it has not been urged before us or apparently before the Special Collector that the notice was not a good one under the Land Acquisition Act; the grievance has been that the notice being under the Land Acquisition Act the proceedings were under the Improvement Act. But there is nothing in the Improvement Act which prescribes that the notice shall be expressed to be under that Act; so that there has been no omission of a formality directed by the Act. It at most only is that there has been a misdescription in a particular, on which the Act is silent. Under these circumstances what we have to consider is, whether the plaintiffs have been in any way misled or damnified. I am clearly of opinion that the plaintiffs have made out no such case.

The merits on this part, therefore, are not in the plaintiffs' favour, and if we are to be guided by the strictest technicalities it is at least a question whether the plaintiffs can claim that they are on their side, for among the imported sections of the Land Acquisition Act is the 1st, which provides that the Act may be called the Land Acquisition Act, 1898, and this is to be deemed to form part of the Act—Chapter III of the Improvement Act—in the same manner as if enacted in the body thereof. But I do not intend to pursue this further, as in my opinion the reason I have already given is sufficient answer to the plaintiffs' objection,

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and an endeavour to discover the purpose and meaning of the Legislature in incorporating section 1 of the Land Acquisition Act is not, under the circumstances, profitable.

In this view of the case the plaintiffs must fail, but as the point has been argued before us at length, it will be convenient that we should consider and determine the issue, whether having regard to section 424 of the Civil Procedure Code (XIV of 1882) the suit is maintainable against the Secretary of State. That section provides:

No suit shall be instituted against the Secretary of State in Council, or against a public officer in respect of an act purporting to be done by him in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the District, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action and name and place of abode of the intending plaintiff, and the relief which he claims; and the plaint must contain a statement that such notice has been so delivered or left.

In this case no notice of suit has been given, but it is argued that, as the remedy sought is an injunction, no notice was necessary. In support of this view the English cases, of which Flower v. Local Board of Low Leyton (1) is a type, were cited to It was further said that the words "in respect of an act purporting to be done by him in his official capacity" must be read not only with "a public officer" but also with "the said Secretary of State in Council." In my opinion, the answer to this argument is that in this suit and in the circumstances of this case no injunction could be claimed against the Secretary of State. In illustration of the position of the Secretary of State in Council, I may refer to the judgment of James, L.J., in Kinlock v. Secretary of State for India.(2)

My finding, therefore, on the issues raised on behalf of the Secretary of State are:

- (1) Having regard to section 424 of the Civil Procedure Code, the suit is not maintainable against the Secretary of State in the absence of notice.
- (2) The proceedings before the Special Collector are not void for any of the reasons stated in the plaint.

(3) The plaintiffs are not entitled to an injunction against him.

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Of the three issues raised by the Trustees and the Special Collector the first was afterwards withdrawn, and my findings on the other two issues are in the negative.

There is one further matter on which I desire to comment; it is the fact that an ex parte injunction was granted. The power, no doubt, exists; but having regard to the circumstances under which business has to be conducted here, I think the greatest care should be exercised in its exercise. There may be instances where the urgency is so great that an ex parte injunction is necessary, but that was not the case here. The suit was instituted and the ex parte order was made on Tuesday the 24th of February, 1903. But there was, so far as I can see, no reason why the plaintiffs should not have been required to serve short notice of motion for the following Thursday, as this would have been in time still to give the plaintiffs any interim relief to which they might have been entitled. Having regard to the conditions which prevail here, the Court should, if possible, always require notice, however short, to be given.

The decree which must be passed here is that the suit must be dismissed with costs, of which there will be two sets, one for the Improvement Trustees and one for the other defendants.

BATTY, J., concurred.

Attorneys for the plaintiffs-Messrs. Craigie, Lynch & Owen.

Attorney for the Secretary of State (defendant 1) and Special Collector (defendant 3)—Mr. E. F. Nicholson (Government Solicitor).

Attorneys for defendant 2 (Improvement Trustees)—Messrs. Crawford, Brown & Co.

APPELLATE CIVIL.

Before Mr. Justice Batty and Mr. Justice Aston.

1902. December 23. SHARFUDIN VALAD TAJUDIN AND OTHERS, HEIRS OF THE DECEASED TAJUDIN VALAD SHEIK AMAD (ORIGINAL PLAINTIFF), APPELLANT, v. GOVIND BHIKAJI BADE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Registration Act (III of 1877), sections 17 and 50—Evidence Act (I of 1872), section 90—Documents thirty years old—Proper custody—Presumption—Registration—Constructive notice—Possession.

A registered document contained a recital of unregistered incumbrances, and a question having arisen as to whether the recital of the unregistered incumbrances amounted to notice,

Held, that registration is at most constructive notice and the doctrine of constructive notice cannot be so extended as to cover unregistered documents under which the holders of registered documents derive title.

The defendants further relied on their being in actual possession.

Possession amounts to notice of such title as the person in possession may have, and any other person who takes a mortgage or other charge upon, or purchases, immoveable property without ascertaining the nature of the claim of the person in possession, does so at his own risk.

The general consensus of opinion of all the High Courts in India is that possession is at least very cogent evidence of notice which a purchaser cannot with safety disregard, and that section 50 of the Registration Act (III of 1877) does not do away with the effect of notice in favour of the registration to which cateris paribus it gives preference.

Per Batty, J.—Section 90 of the Evidence Act (I of 1872) admits a presumption of the genuineness of documents purporting to be thirty years old, if produced from proper custody proved to have had a legitimate origin for an origin the legitimacy of which the circumstances of the case render probable. It is not necessary that the documents shall be found in the best and most proper place of deposit. The section insists only on a satisfactory account of the origin of the custody and not on the history of its continuance.

Per Aston, J.—Section 90 of the Evidence Act requires that a document must be produced from the proper custody.

SECOND appeal from the decision of F. K. Boyd. Assistant Judge of Ratnágiri, amending the decree of Ráo Sáheb G. D. Deshmukh, Subor linate Judge of Dápoli.

^{*} Second Appeal No. 86 of 1902.

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Suit for redemption. The property in dispute originally belonged to one Bhaudin Mukadam, the grandfather of defendant 1, Bhikya alias Mahmad Ismail valad Salaudin. On the 17th December, 1837, Bhaudin mortgaged the property for Rs. 645-12-3 to Bapuji Chintaman Bade, the grandfather of defendants 2-5 and paternal uncle of defendant 6. The plaintiff subsequently purchased the equity of redemption from defendant 1 by a deed of assignment dated the 3rd December, 1897. The consideration for the assignment was Rs. 645-12-3, the mortgage-debt due to Bapuji Chintaman Bade, and Rs. 50 paid in cash. On the strength of the deed of assignment the plaintiff brought the present redemption suit alleging that defendants 7-10 were joined because they were in possession of the property.

Defendant 1 denied having passed the assignment to the plaintiff. He contended that the plaintiff had fabricated the assignment and that he alone had the right to redeem Bade's mortgage.

Defendants 2-6, who were members of a joint family, admitted the mortgage relied on in the plaint and contended that the son of the original mortgagor had made a further charge upon the property, that defendant 2 made repairs to the property at his own cost and paid Government assessment, that their rights as mortgagees were sold to defendants 7-10, and that the plaintiff was aware of the sale.

Defendants 7-10 answered that they had purchased the property in suit from defendant 2 for Rs. 1,275 under a sale-deed dated the 12th April, 1893, that the transaction was effected through plaintiff, that the plaintiff's assignment was colourable, that defendant 1 had no right to make the assignment, that the original mortgagor's sons and daughters had passed other money bonds to the mortgagee Bade, that they had improved the lands at considerable cost amounting to Rs. 1,225, and that the total money due to them on the mortgage was Rs. 2,500 which ought to be paid to them.

At the trial the following issues were framed:

- 1. Whether or not the plaintiff's assignment is proved?
- 2. If not, whether or not the plainsiff has a right to bring this suit?

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- 3. What amount is due on the mortgage sought to be redeemed, including cost of repairing and improving the property and the payment of dast (assessment) thereon by Bade?
 - 4. If redemption is to be allowed, on what terms can it be allowed?
 - 5. To what relief, if any, is the plaintiff entitled?

The Subordinate Judge found on the evidence that the plaintiff's assignment was not proved. He therefore dismissed the suit without recording findings on the other issues.

On appeal by the plaintiff, Ráo Bahádur Vaman M. Bodas, First Class Subordinate Judge of Ratnágiri with appellate powers, found that the plaintiff's assignment (Exhibit No. 78) was satisfactorily proved and that he was entitled to redeem the mortgage in question. The Judge, therefore, reversed the decree and remanded the case for findings on other issues and a fresh decision according to law.

On the remand the Subordinate Judge found that the plaintiff's assignment was proved, that the plaintiff had a right to bring the suit, that Rs. 1,130-12-3 were due on account of the mortgage sought to be redeemed, the costs of repairs and the payment of dast (assessment) on the lands being not proved, and that on payment of Rs. 1,130-12-3 within six months from the date of the decision (30th October, 1900) to defendants 7-10 the plaintiff could redeem the property in suit from the mortgage and recover its possession from the defendants. The following are extracts from the Subordinate Judge's judgment:

The plaint has alleged that this property originally belonged to Bhaudin valad Kutubudin Mukadam, the grandfather of defendant No. 1, Bhikya alias Mahmad Ismail valad Salaudin Mukadam; that Bhaudin, the said grandfather of defendant No. 1, mortgaged the said property with Bapuji Chintaman Bade, the grandfather of defendants Nos. 2 to 5 and paternal uncle of defendant No. 6, for Rs. 645-12-3 on the 17th December, 1837. The plaintiff subsequently on the 3rd day of December, 1897, purchased the said property from defendant No. 1, Bhikya, by a deed of assignment (Exhibit No. 78) for Rs. 665-12-3.

The defendants have produced four mortgage-bonds (Exhibits Nos. 56, 57, 58 and 59) relating to the plaint property. The first mortgage-bond is Exhibit No. 56, and that subsequently the mortgager contracted a further debt of Rs. 242-8-0 on the said mortgage, agreeing to pay this further debt before redeeming the first mortgage (Exhibit No. 56).

Witness No. 61 has proved the mortgage-bonds Exhibits Nos. 57, 58 and 59. Defendant No. 2 admits Exhibit No. 56.

Defendant No. 2 in his examination (No. 60) admits all these mortgages, namely, Exhibits Nos. 56, 57, 58 and 59.

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The plaintiff therefore is bound to pay all these mortgages before he can redeem the plaint property which was mortgaged with Bapuji Chintaman Bade. The first mortgage is for Rs. 645-12 3 and the subsequent mortgages (Exhibits Nos. 57, 58 and 59) are for Rs. 242-8-0. There is an agreement to pay interest on this subsequent sum advanced on the security of the original mortgage. The mortgaged property has been in the possession and enjoyment of the mortgage from the date of the original mortgage. The mortgage has no accounts to show the profits. The plaintiff has not also proved the profits. The plaintiff therefore is bound to pay interest as stipulated in the mortgage-bonds (Exhibits Nos. 57, 58 and 59). The rule of dámdupat applies to mortgages and according to that rule the interest amounts equal to the principal sum, namely, Rs. 242 8-0.

The amount of subsequent mortgages, therefore, with interest amounts to Rs. 485, to which, if the amount of the original mortgage, namely, Rs. 645-12-3, be added, the total sum of the whole mortgage money amounts to Rs. 1,130-12-3, which the plaintiff, under the circumstances discussed above, is bound to pay to the mortgage before he can redeem the plaint property from mortgage.

Both the parties having preferred cross appeals the Assistant Judge amended the decree in the following terms:

I amend the decree of the lower Court, and direct that plaintiff do pay to defendants 7-10 the sum of Rs. 1,833-5-10 within six months from the date of this decree (17th September, 1991), together with further interest at 6 per cent. on Rs. 242-8-0 from date of suit to date of payment or expiration of the above six months, and redeem the plaint property from mortgage and recover possession of the same from defendants 7-10. Plaintiff to bear costs of both appeals and in the lower Court. In default of payment as above, plaintiff's right to redemption shall be foreclosed.

The following are the material extracts from the Judge's judgment:

The original mortgage of 1937 is Exhibit No. 56 and is admitted on either side. The terms laid down are that profits are to be enjoyed by the mortgagee in lieu of interest. Exhibits Nos. 57-59 are produced by defendant 2 on behalf of defendants 7-10, against whom alone, as will be seen later, the present claim lies. These are money bonds creating further charges on the mortgaged property, dated March 1864, February 1865, and March 1866, and passed by defendant 1's father Salaudin and by a daughter of the original mortgagor, defendant 1's grandfather. The first is for Rs. 57-8-0, the second for Rs. 95, and the third for Rs. 90. The rate of interest is fixed in all three at 12 per cent. The total amount is Rs. 242-8-0. The learned Subordinate Judge has found these bonds to be proved and by application of the rule of dåmdupat has fixed the amount now payable thereon at Rs. 485. It is not asserted

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Plaintiff contends that these bonds are not genuine and that two of them (Exhibits 58 and 59) are not admissible for want of registration and proper stamping. With regard to the first point, the learned Vakil for the plaintiff has quoted Trailokia Nath Nundi v. Shurno Chungoni 1) to show that the presumption laid down in section 90, Evidence Act, is permissive only-a point sufficiently obvious. The three bonds are produced by defendants 2-6 and are over thirty years old. Now defendants 2-6 are representatives of the original mortgagee. Bapuji Chintaman Bade. On 12th April, 1893, they sold absolutely their right, title and interest in the mortgage to defendants 7-10 for Rs. 1,275. This sale deed is Exhibit 55 and is duly registered. The following recital, inter alia, is of interest: "We (i.e., defendants 2-6) hold this property in mortgage from deceased Bhaudin under a mortgage bond dated Shake 1759 (i.e., 1837), and his direct heirs have received more money from our ancestor and have passed separate documents on stamped paper." This is a clear allusion to the bonds now in dispute and further accounts for the fact that they are produced by defendants 2-6 and not by defendants 7-10. The latter should, of course, have taken the bonds into their own custody. But with a clear allusion thereto in their bond (Exhibit 55), it is quite possible that they thought this unnecessary. I therefore cannot hold that the custody from which the bonds were produced was improper.

It is further objected that these bonds (Exhibits 57-59) were not produced at the proper time. Defendant 1 is merely plaintiff's assignor of the equity of redemption; defendants 2-6 are merely vendors of defendants 7-10. It will therefore be seen that only the latter have any particular concern in the case. And they had not got the bonds. They are also illiterate men of the lowest caste, while defendants 2-6 are educated Brahmins. The latter must at the time of Exhibit 55 have known perfectly well that Exhibits 57-59 ought to be handed over to their vendees, while these may very easily not have known this. It is sufficiently obvious, even with regard to a case like the present, why they were not banded over; and probable that the expenses incurred by defendants 7-10 in the case include at any rate one item not altogether official. these circumstances I do not regard the time of production as very material. Again, Exhibit 55 further recites: "Besides this (i.e., the bonds mentioned), if we make account of the whole the amount due will be very large, but we accept the above sum (i.e., Rs. 1,275) and sell you all our mortgage rights." The amount of the original mortgage of 1837 is Rs. 645-12-3 and the arrangements being profits in lieu of interest, that mortgage could at any time before the expiration of sixty years from 17th December, 1837, have been redeemed by payment of the

original amount only. It is therefore clear that there were further charges the right to which was sold under Exhibit 55. In the face of the unsatisfactory evidence as to the improvements, I cannot believe they were on that account. And plaintiff, very naturally, does not assert this. The only other explanation possible is that the further charges consist of these money bonds now disputed. I therefore do not hesitate in finding them proved.

The second part of plaintiff's contention in the matter of these bonds must now be examined. Exhibit 58 undoubtedly requires registration, in that it extends the period of redemption by twenty-five years (vide section 13 of Act XVI of 1864 which was then in force). But the only effect of the want of registration is that the redemption period cannot be extended. This is perfectly clear from the ruling in Lachmipat Singh Dugar v. Khairat Ali (1) followed in Monomothonath Day v. Sreenath Ghose (2) And there is no question of its being used for that purpose in the present case.

The only question remaining is the amount now payable on the money bonds (Exhibits 57-59). The principal of these three bonds amounts to Rs. 242-8-0. The lower Court is wrong in applying the rule of dámdupat. The original mortgagor in this case was Bhaudin valad Kutubudin Mukadam, a Mahomedan. His heir, defendant 1, is also a Mahomedan, and so is his assignee, present plaintiff. In Harilal Girdharlal v. Nagar Jeyram (3) it is clearly laid down that the rule of dámdupat does not apply to transactions to which a Mahomedan is a party; vide also Dawood Durvesh v. Vullubhdas (4) and Ali Saheb v. Shabji. (5) I have calculated the sum due upon these lands to amount to Rs. 242-8-0 principal + Rs. 950-1-7 interest due up to date of suit at 12 per cent. which is the rate named in the bonds; in all Rs. 1,192-9-7. To this must be added the principal amount of the original mortgage, Rs. 645-12-3.

The plaintiff preferred a second appeal, and as he died pending the second appeal his heirs were brought on the record.

Narayan V. Gokhale for the appellant (plaintiff):—We sued for redemption and we have been ordered to redeem on payment of the original mortgage debt due under the principal bond as well as the sums due under the unregistered money bonds, Exhibits 57, 58 and 59. We contend that the liability of discharging the debts due under the other three bonds was wrongly placed on us. In the first place, these bonds did not come from proper custody. Under section 90 of the Evidence Act, documents more than thirty years old may be presumed to be genuine, but that presumption does not dispense with the necessity of their

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^{(1) (1869) 4} B. L. R. 18; 12 Cal. W. R. (F. B.) 11.

^{(2) (1873) 20} W. R. 107.

^{(3) (1895)} P. J. p. 304; 21 Bom. 38.

^{(4) (1893) 18} Bom. 227.

^{(5) (1895)} P. J. p. 362; 21 Bom. 85.

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coming from proper custody. It does not require that such documents should be formally proved, but it is necessary that there must be some proof in their support. Further, one of the bonds (Exhibit 59) purports to have been executed by a female named Fatma. She has merely put her mark. There is no evidence to show that she was in any way connected with the mortgagor's family or that she had any right to further encumber the mortgaged property.

Our next contention is that these bonds required registration and being unregistered are inadmissible in evidence. Under each of the said bonds, which stipulate that the amount secured in each shall be paid at the time of redemption of the mortgage, the equity of redemption is worth more than one hundred rupees, and therefore they ought to have been registered. One of the bonds, namely, Exhibit 58, even postpones the equity of redemption for twenty-five years. Such bonds require registration: Vithal Krishna v. Shaik Mugut (1); Gopal Mahipat v. Ganpatrao. (2)

The said bonds being unregistered, they cannot have priority over our registered sale deed under section 50 of the Registration Act.

[S. R. Bakhle for the respondent:—This point was not raised in the lower Courts nor was it taken in the memorandum of the second appeal. It is now urged for the first time, to which we object.]

The point is purely one of law, and such points can be raised in second appeal: Giriapa v. Ningapa (3); Nagesh v. Gururao. (4)

We are bond fide purchasers for value, having no notice of the unregistered incumbrances, which were merely passingly mentioned in the defendants' sale deed. Registration is merely a constructive notice of the registered document, but it cannot be said that the registration of a document operates also as a constructive notice of the unregistered instruments recited therein: Chunilal v. Ramchandra (5); Lachman Das v. Dip Chand (6); Gungaram Ghose v. Kalipodo Ghose (7); Shivram v. Saya (8); Kanit-

^{(1) (1883)} P. J. p. 34.

^{(2) (1893)} P. J. p. 95.

^{(8) (1892) 17} Bom, 100.

^{(4) (1892) 17} Bom. 303.

^{(5) (1896) 22} Bom. 213.

^{(6) (1880) 2} All. 851,

^{(7) (1885) 11} Cal. 661.

⁽s) (1888) 13 Bom. 229.

kar v. Joshi⁽¹⁾; Bapuji Balal v. Satyabhamabai⁽²⁾; Rajaram v. Krishnasami⁽³⁾; Patman v. Harland.⁽⁴⁾

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Sadashiv R. Bakhle (for Daji A. Khare) for the respondents (defendants):—The question with respect to the proper custody of the bonds cannot be entertained in second appeal. The Judge has found on the evidence that the custody was proper. That being so, it becomes a question of fact, and the Court in second appeal cannot question that finding.

As to Exhibit 59, it is now too late to question Fatma's right to encumber the property. In the lower Courts the case was argued on the assumption that she had the right to do so.

On the point of registration, we submit that the bonds do not create a new incumbrance and therefore they are admissible, though unregistered. The first bond is dated 1864, that is, before any Registration Act was passed, therefore it did not require registration, though the debtor has thereby undertaken the liability to pay the whole debt. The subsequent bonds also contain the same stipulation as to the payment of the debt, but they do not create any fresh charge, the liability for the payment of the debt having been already undertaken.

With respect to the question of priority under section 50 of the Registration Act, we submit that the question was not raised in the Courts below. If it had been raised there, we would have clearly shown by reference to the positive evidence in the case that the plaintiff had actual notice of our claim. The question of notice by registration of a document cannot arise when the person concerned has actual notice. We as well as our predecessor have been all along in actual possession of the property. Our actual possession was sufficient notice to put the plaintiff on his guard when he effected the purchase. It is for the plaintiff to prove that he had no knowledge of our claim and that he had made inquiry. There is nothing in the case to show that he did so.

Gokhale in reply.

^{(1) (1881) 5} Bom. 442.

^{(2) (1882) 6} Bom. 490,

^{(3) (1892) 16} Mad. 301.

^{(4) (1881) 17} Ch. D. 353

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BATTY, J:—In this case the plaintiff, as purchaser of the equity of redemption, sued to redeem and recover possession of certain thikáns originally mortgaged with possession by the plaintiff's vendors to the ancestors of defendants 2-6, who, on 12th April, 1893, had by Exhibit 55 transferred their rights to defendants 7-10 for Rs. 1,275.

The defendants contended that plaintiff could not recover possession without redeeming three bonds (Exhibits 57, 58 and 59) as well as the original mortgage of 1837 (Exhibit 56). The Court of first instance and the lower Appellate Court held that this contention was correct, but while the Court first mentioned limited the interest payable by applying the rule of dámdupat, the lower Appellate Court decided that full interest on the three bonds was payable by plaintiff at the rates in those bonds speci-Exhibit 55, the registered instrument whereby defendants 2-6 transferred their rights to defendants 7-10, recited that the property in question was held in mortgage from one Bhaudin under the mortgage bond of 1837 (Exhibit 56), and added that Bhaudin's direct heirs had received more moneys from the original mortgagee and passed separate documents on stamped paper, and that if accounts were taken of the whole the amount would be very large, but that Rs. 1,275 had been accepted by the original mortgagees from defendants 7-10 and that in consideration of that sum all the mortgaged rights were accordingly sold to defendants 7-10.

The original mortgage deed of 1837 (Exhibit 56) was for Rs. 645-12-3, and possession was given thereunder to the mortgagees, profits being taken by them in lieu of interest. This mortgage deed (Exhibit 56) is stated by the lower Appellate Court to be admitted by all parties as the mortgage referred to in the document (Exhibit 55) which transferred the original mortgagee's rights to defendants 7-10.

The later documents (Exhibits 57, 58 and 59) were not specifically described in the defendants' assignment. They were not handed over by the original mortgagees to the defendants 7-10 either at date of Exhibit 55 or at any time before suit; nor were they specifically described in the written statements put in for the defence. The written statement of defendant 2 refers only

to a further charge on the mortgaged property made by the son of the original mortgagor; while defendants 7-10 in their joint written statement alleged that the original mortgagor's sons and daughters had passed other money bonds to Bade, the original mortgagee. These Exhibits 57 to 59 were not produced by defendants 7-10, but by the defendants 2-6.

Exhibit 57 purports to have been executed in March, 1864, by one Salaudin, son of the original mortgagor, for Rs. 57-8-0. It is unregistered. It recites the fact that the mortgage of 1837 for Rs. 645-12-3 (Exhibit 56) had been executed by the obligor's father and purports to confirm it by an undertaking to pay the amount thereof together with the sum of Rs. 57-8-0, which is stated to have been advanced on the same security, and with interest on the Rs. 57-8-0 at 12 per cent. per annum. Exhibit 58 purports to have been executed by the said Salaudin for Rs. 95 "advanced on the same security" in February, 1865, contains recitals and undertakings similar to those in Exhibit 57 with regard to the mortgage of 1837, and adds, "I will not interfere with the land for twenty-five years."

Exhibit 59 purports to have been executed in March, 1866, by one Fatma Bibi, the daughter-in-law of the original mortgagor, for Rs. 90 as a charge on the same land, bearing interest at Rs. 18 per cent., and to refer to and confirm Exhibits 56 and 58.

All these three documents purporting to be more than thirty years old, the question arose whether they were admissible as produced from proper custody.

For the appellants it is contended that these Exhibits 57 to 59 required more proof than had been adduced, and could not be accepted merely on the ground of their alleged antiquity and of their production by defendants 2-6; that section 90 of the Indian Evidence Act, 1872, was therefore inapplicable to them, and that under the ruling in Uggrakant Chowdhry v. Hurro Chunder Shickdar, (1) Exhibit 59 at least required proof of execution by the person Fatma, whose mark alone purports to have been affixed thereto, and further that all the three documents, as purporting to extend the interests created by Exhibit 56, were compulsorily registrable and inadmissible for want of registration,

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SHARFUDIN v. GOVIND. and in any case were ineffectual by reason of section 50 of the Registration Act, 1877, as against the registered deed under which the plaintiff claims, and that plaintiff as a bond fide purchaser without notice could not be affected thereby.

In support of the first of these contentions, viz., that the documents were not sufficiently proved by evidence of production from proper custody, the rulings in Mussamut Phool Bibec v. Goor Surun Doss (1) and Mussamut Fureedoonnissa v. Ram Onogra Singh (2) were cited for the appellants. The first of these decisions was passed only a few days after the present Evidence Act of 1872 came into force, makes no reference to that enactment and refers to the rule relating to ancient documents as one of English Law to be applied subject to conditions and precautions which are suggested in English text books, such as Pitt Taylor and Phillips, and which have not been embodied in section 90 of the modern Indian Evidence Act. The later ruling practically accepts as sufficient the test required by section 90 of the Indian Evidence Act, which, however, is not there cited.

Now, the section itself admits a presumption of the genuineness of documents purporting to be thirty years old, if produced from custody proved to have had a legitimate origin or an origin the legitimacy of which the circumstances of the case render probable (vide explanation to section 90). It is not necessary that the document should be found in the best and most proper place of deposit (Bishop of Meath v. Marguis of Winchester (3)), and the section read with the explanation attached thereto seems to insist only on a satisfactory account of the origin of the custody and not on the history of its continuance. Possibly the origin of the custody was alone regarded as material, because it is intelligible that ancient documents may be overlooked and left undisturbed not withstanding a transfer of old, or creation of new, interests. In the present instance, it is true, Exhibits 57, 58 and 59 were not mere links in the chain of title, but the basis of rights alleged to have been transferred, and it might have been expected that they would have been handed over at the transfer of the mortgagee's rights. But the circumstance that they were not so handed over

(1) (1872) 18 Cal. W. R. 485. (3) (1836) 3 Bing. N. C. 183 pp. 201, 202.

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affects rather the history of the subsequent transactions than the probabilities as to the origin of the custody. The question of proper custody is no doubt one which would in England be left to the Judge and not to the jury: Pitt Taylor on Evidence, section 22. But this does not prevent the question from being one entirely dependent upon findings of fact, for, as stated by Pitt Taylor (p. 37) "the question of admissibility must be exclusively decided by the Judge, however complicated the circumstances may be, and though it may be necessary to weigh the conflicting testimony of numerous witnesses in order to arrive at a just conclusion." Whether it were credible or not that the documents in question were originally left in the custody of the mortgagee in whose favour they were executed appears to me to be as much a question of fact as the question whether they were executed by the alleged obligors or not, and even if it were a question of law, it would, I think, be impossible to hold that the origin of the mortgagees' custody was not both legitimate and probable. The further question whether the alleged subsequent history of those documents was sufficient to throw suspicion on their authenticity and rebut any presumption arising under section 90 was, I think, undoubtedly one of fact with which it is impossible to interfere on second appeal. regard being had to the decision of the Privy Council in Durga Chowdhrani v. Jewahir Singh Chowdhri. In these circumstances, I think, there is no alternative but to accept the finding of the lower Appellate Court that these Exhibits 57 to 59 were produced from custody which is proper within the meaning of section 90 of the Evidence Act, and that they were duly executed by the persons by whom they purport to have been executed. The objection that Exhibit 59 bears only the mark of the alleged obligor appears to have no weight in face of the concluding words of the section, for it is not contended that the document does not purport to have been executed by the person whose mark it purports to bear, and this, in the case of a document falling under section 90, is sufficient, although had it been necessary to prove execution, it would have been necessary to prove the identity of the executing party.

The question whether Fatma, who purports to have executed

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Exhibit 59, was competent to create a charge upon the property to be affected thereby, does not appear to have been specifically raised in the memorandum of this appeal or in the lower Appellate Court or even in the Court of first instance, and should not, I think, be entertained now.

Next, it is contended that none of the documents in question are admissible, as they were all compulsorily registrable.

So far as Exhibit 57 is concerned this contention must necessarily fail, inasmuch as it purports to have been executed in March, 1864, and the Registration Act XVI of 1864 did not come into operation in this Fresidency (vide section 71) until 1st January, 1865.

The other two documents, Exhibits 58 and 59, being respectively dated February, 1865, and March, 1866, both come within the operation of Act XVI of 1864 and, it is urged, are both compulsorily registrable under section 13 thereof, as though the consideration appearing on the face of the documents is in each case under Rs. 100, each of them undertakes liability for the previous deed and provides for the redemption of that mortgage for Rs. 645. In this connection appellants rely on the unpublished case of Vithal Krishna v. Shaik Mugut, (1) which distinguishes the case of an agreement undertaking a liability for a mortgage not otherwise binding, from the case of a mere recital or declaration of a fact such as in Sakharam Krishnaji et al. v. Madan Krishnaji 2) was held not to render registration necessary. The case of Gopal Mahipat Pangaokar v. Ganpatrav 3) was further relied on as showing that Exhibit 58, which postpones the date at which the original mortgage of 1837 should be redeemable, limited the equity of redemption under that mortgage, and therefore required to be registered, and being unregistered could not affect the equity of redemption. As to the first of these cases (Sakharam Krishnaji v. Madan Krishnaji), it is to be noted that the mortgages therein related to lands that were wakf and were not effected for musjid repairs, so that "it was admitted, under these circumstances, the mortgages could not be supported against the religious endowments." And it was for this reason that it was sought to

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charge the sons of the original mortgagor by the agreement entered into by them subsequently in an unregistered writing to pay off the mortgages, and it was also endeavoured to use that agreement as an estoppel which would prevent the plaintiffs from pleading that they were not bound by the first mortgage. It was because the plaintiffs were not, ex concessis, bound by the first mortgage, as it could not be supported against the religious endowment, that it was necessary to prove the agreement against them, and for this purpose it was inadmissible in evidence inasmuch as it was not registered. But in the present instance there is no plea that the plaintiff is not bound by the first mortgage. He sues to redeem it and has never disputed liability to pay it off. The subsequent documents, Exhibits 58 and 59, were not required as evidence to prove that liability and are not inadmissible to establish the liability for the sums respectively secured by them, viz., Rs. 95 and Rs. 90. They do not, therefore, impose or create. or in any way affect, the undisputed liability for the mortgage of 1837 which arises aliunde, and are a mere declaration of the fact of a liability which the plaintiff has throughout made no attempt to dispute. In the case of Gopal Mahipat v. Gangatrar, (1) cited above, the liability of the sons for their father's mortgage was unquestioned, but their father's agreement to pay off a subsequent money bond for Rs. 175 before paying off the mortgage was held inadmissible as an unregistered document. And in holding it inadmissible the case of Narayan Govind v. Rarji Balwant (9) was cited. A reference to that last cited case shows that the reason for holding such subsequent document inadmissible was that it had the effect of limiting the interest of the mortgagor to the extent of Rs. 100, and therefore required to be registered. This ground cannot apply to Exhibits 58 and 59, all of which limit the mortgagor's interest to an extent less than Rs. 100. These cases appear, therefore, inapplicable for the purpose of showing that these documents were compulsorily registrable. They did not operate to impose liability for the mortgage of 1837, which liability plaintiff admits, while he disputes the existence of the agreements which

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Exhibits 58 and 59 purport to evidence. And they do not limit the rights of redemption under the mortgage of 1837 to the extent of Rs. 100. It is possible that under the recent rulings in Noakes v. Rice (1) and Jarrah Timber v. Samuel (2) the agreement in Exhibit 59 to postpone the time for redemption of the mortgage of 1837 for twenty-five years might have been regarded as void on the ground that it clogged the equity of redemption. But no such point has been taken and the time has long passed at which it might have been taken. The documents Exhibits 57, 58 and 59 all purport to be fresh charges on the same security, and are therefore otherwise free from such objection.

The next point taken for appellant is that the provisions of section 50 of the Registration Act, 1877, apply to these documents Exhibits 57, 58 and 59, viz., that every registered document of the kinds mentioned in clauses (a), (b), (c) and (d) of section 17, and therefore Exhibit 56 which falls within that description, shall take effect as regards the property comprised therein, against every unregistered document relating to the same property, and therefore as against such documents as Exhibits 57, 58 and 59. To this contention respondents objected that it had not been raised in the Courts below or in the memorandum of appeal in this Court. The objection is met by appellant citing the cases of Giriapa v. Ningapa (3) and Nagesh v. Gururao (4) as the new point is purely a question of law, arising on the findings of the Courts below and not affected by any facts outside these findings. The point was, therefore, allowed to be fully argued. And the wording of the section is so clear that the respondents were unable seriously to contend that its provisions would not be fatal to their attempt to charge the property with liability in respect of the unregistered documents (Exhibits 57. 58 and 59) apart from the operation of the equitable doctrine of notice. This grave ground of objection, indeed, forms the really important matter of contest in this appeal. The appellant contends that he is a purchaser bond fide without notice, and on its being objected that Exhibit 55 is a registered document containing a recital of incumbrances, it is urged

^{(1) (1902)} A. C. 21.

^{(2) (1902) 2} Ch. 479.

^{(3) (1892) 17} Bom. 100.

^{(4) (1892) 17} Bom, 303.

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for appellant that registration is at most constructive notice, and that the doctrine of constructive notice cannot be so extended as to cover unregistered documents under which the holders of registered documents derive title, and Chunilal v. Ramchandra (1) is cited as authority. In that case the plaintiffs were out of possession and had purchased under a registered deed from a vendor whose title deed was unregistered, and it was held that plaintiff and his grantors were mere strangers to the land, unless they could rely on the unregistered conveyance which could take no effect upon the property when brought into competition with the registered conveyance to the defendant. And when it was argued that the defendant had notice of the unregistered document through the registered document, the Court held that it would be pushing the doctrine of constructive notice beyond all bounds to hold that it is notice of the unregistered documents under which the holders derived their title. If, then, in this case the question rests merely on the competition between registered and unregistered documents, the ruling in Chunilal v. Ramchandra (1) would be decisive against the defendants. Appellant relied also on Lachman Das v. Din Chand. (2) a Full Bench ruling of the Allahabad High Court, where the plaintiff sued unsuccessfully to recover money by sale of properties hypothecated on unregistered bonds against a defendant to whom the same property had been transferred by registered deed. The case of Gungaram Ghose v. Kalipodo Ghose, (3) also cited for appellant, is essentially to the same effect. Shivram v. Saya, (1) Kanitkar v. Joshi, 5) and Bapuji Balal v. Satyabhamabai (0) were also cited, but appear irrelevant. The appellant further cites the case of Rajaram v. Krishnasami (7) and the case there quoted of Patman v. Harland (8) as authority for the position that constructive notice of a deed is constructive notice of its contents, provided the deed is a deed relating to the title and forming part of the chain of title. The case of Patman v. Harland, however, on a careful perusal appears to me in no

^{(1) (1896) 22} Bom. 213.

^{(2) (1876) 2} All. 851.

^{(3) (1885) 11} Cal. C61.

^{(4) (1883) 13} Bom. 229.

^{(5) (1831) 5} Bom. 442.

^{(6) (1882) 6} Bom. 490.

^{(7) (1892) 16} Mad. 301.

^{(3) (1:81) 17} Ch.D. 353, 2 pp. 357-358.

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way to support the appellant's argument. For that case relates to the duty of a purchaser or lessee to look into the chain of his vendor's or lessor's title, and with special reference to the cases of Jones v. Smith (1) and Carter v. Williams (2) appears to exonerate the purchaser or lessee from the duty of enquiry as to a document of which he has constructive notice, only in cases where he might get a complete chain of title without any notice of that document where he would be justified in resting assured that it could not affect him. But Jessel, M.R., was careful to say, "that line of cases has no bearing at all on a case where you know the deed does affect the land." For reasons to be stated below, however, the cases of Rajaram v. Krishnasami (3) and Patman v. Harland (4) appear to me to lay down no principle on which the plaintiff in this case could be relieved from the duty of enquiry. The arguments for the appellant throughout assume that the plaintiff was affected only by the constructive notice which might have been afforded by Exhibit 55, the registered documents under which the defendants claimed. rely upon Doorga Narain Sen v. Baney Madhub Mozoomdar, (5) which is a case in which the Court held that the circumstances were not sufficient to fix the plaintiff with constructive notice or to put him upon enquiry. And the case is spoken of as falling within the language of the Privy Council in Ram Coomar v. Mc-Queen (6) wherein the principle appropriate rested upon the equity that "where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value, from the apparent owner, in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title," unless he can show direct notice, constructive notice or circumstances putting the purchaser on an enquiry. It is clear that such a case can have no bearing in the present instance. In the case cited there was no actual notice, and the vendors had been placed in such a position as to be the apparent owners, and it was with reference to those circumstances that the Calcutta High Court held that unless

^{(1) (1841) 1} Hare 43.

^{(2) (1870)} L. R. 9 Eq. 678.

^{(3) (1892) 16} Mad. 301.

^{(4) (1881) 17} Ch. D. 253, 2 pp. 357-358.

 ^{(1881) 7} Cal. 199.
 (1872) 11 Beng. L. R. 53; 18 Cal.
 W. R. 166.

there is wilful or fraudulent turning away from enquiry, the

doctrine of constructive notice would not apply. The case Re Bright's Trusts (1) was also referred to. That relates to a charge without notice on a chose in action, and it appears that except so far as the actual notice was given, subsequent incumbrancers could have no knowledge whatever of the existence of any prior charge. In that case the charge was one on a fund in the hands of trustees, and notice was given only of one of two charges created in the same deed, that for the life policy being unmentioned, and that the express notice given implied that no other charge was alleged. It is clear that the principles of that case apply only to the duty of enquiry arising in cases where, apart from constructive notice, there is nothing to put the purchaser on enquiry. In the present instance the appellant has put his case as if there were nothing but the constructive notice furnished by the registered deed of assignment to the defendants 7-10 (Exhibit 55), and they rely, therefore, on the inadequacy of such notice as an all-sufficient protection. For this purpose they lay stress on the cases already cited of Chunilal v. Ramchandra (2) and Rajaram v. Krishnasami (3) and on the ruling in Inderdawan Pershad v. Gobind Lall Chowdhry. (1) where approving Shan Maun v. Madras Building Company (5) it was held, notwithstanding Bombay decisions, that mere registration is not notice within the meaning of section 81 of the Transfer of

Property Act such as to put on a purchaser responsibility for abstention from enquiry. And if the present case rested only upon the question whether Exhibit 55 was constructive notice of Exhibits 57, 58 and 59, I think that the authorities cited on behalf of appellant would be apposite on the point whether the plaintiff was bound by the incidental reference to those documents. But the case does not rest there. For, the defendants were admittedly in possession. And it has been held in a long series of cases in this Presidency that possession is notice: see especially Lakshmandas v. Dasrat, (6) Dundaya v. Chenbasappa (7)

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⁽i) (1856) 21 Beav. 430.

^{(2) (1893) 22} Bom. 213.

^{(3) (1892) 16} Mad. 301.

^{(4) (1896) 23} Cal. 790.

^{(5) (1891) 15} Mad. 268.

^{(6) (1880) 6} Bom. 168.

^{(7) (1883) 9} Bom. 427.

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Waman v. Dhondiba, (i) Sobhagchand v. Bhaichand, (2) Balaram v. Appa, (3) Ganpat v. Khandu, (4) Mancharji v. Kongseoo, (5) Nagesh v. Balvantrav, (6) Manmal v. Dashrath. (7)

The case of Moreshwar Balkrishna v. Dattu,(8) it may be noted, is not really opposed to this principle, for the ratio decidendi there proceeded upon the fact that the plaintiff, the prior unregistered mortgagee, was not in actual possession and that his mortgagor was, and that persons subsequently dealing with the property had no reason to suppose that he was in possession otherwise than as owner. But in the present instance the mortgagee was in possession and apparently had been continuously from 1837. And therefore the plaintiff had every reason to suppose that there was an incumbrance on the property and does not profess to have supposed that there was not. "Possession," according to the Full Bench ruling in Lakshmandus v. Dasrat, (9) "has been deemed by Hindu and Mahomedan laws, as interpreted in this Presidency, to amount to notice of such title as the person in possession may have, and any other person who takes a mortgage or other charge upon, or purchases, immoveable property, without ascertaining the nature of the claim of him in possession, does so at his own risk. This is so in England also. See Daniels v. Davison (10) and the other cases in which its authority has been recognised, collected in Sugden's Vendors and Purchasers (page 1052, edition 11th) and 2 White and Tudor's Leading Cases in Equity, page 61 et seq." This principle is quite distinct from that which was adopted in the same case, on the authority of American cases, as to registration being in itself notice to subsequent purchasers and mortgagees, and appears from note 2 on page 188 of the Full Bench judgment to be based on the remark of Wigram, V.C., in Jones v. Smith (11) that "possession is prima facie evidence of a seisin in fee." In the passage preceding that remark the Vice-Chancellor stated as a proposition which he did not dispute, "that if a person purchases

^{(1) (1879) 4} Bom. 126.

^{(2) (188.) 6} Bom, 193 at p. 201.

^{(3) (1872) 9} Bom. H. C. kep. 21.

⁽i) (1867) 4 Poin. H. C Rep 69 (a. e.)

^{(6) (1809) 6} Bom. H. C. Rep. 59 at p. 62.

^{(6) (1872) 9} Bom. H. C. Rep. 151 f.n.

⁽⁷⁾ Ibid p. 147.

⁽S) (1888) 12 Bem. 509.

^{(9) (1889) 6} Bom. 168.

Rep. 59 at p. 62. (10) (1811) 17 Vesey 433. (11) (1841) 1 Hare 43, vide p. 60.

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an estate which he knows to be in the occupation of another than the vendor, he is bound by all the equities which the person in such occupation may have in the land." Daniels v. Davison, (1) then spoken of "as an extreme case," has, as observed in Mancharji Sorabji v. Kongseoo,(2) been repeatedly acted upon. The Full Bench case of Lakshmandas v. Dasrat (3) was followed by Sir Charles Sargent and Mr. Justice Melvill in Dundaya v. Chenbasanna, (4) where it was said (pages 428-9), "assuming that the defendant was in possession when the mortgage deed was executed to plaintiff, or that plaintiff had otherwise notice of defendant's purchase, it is clear that the latter could derive no advantage from the registration of his mortgage." was with special reference to section 50 of the Registration Act of 1877 and does not rest on the doctrine of constructive notice by registration. Shivram v. Genu, (5) dealing with section 50 of Act XX of 1866, was cited as to similar effect. Dundaya v. Chenbasappa was followed in Hathising v. Kurarji. (6) Sobhagchand v. Bhaichand (7) is another Full Bench ruling laying down that possession is notice to all subsequent intending mortgagees or purchasers of the title of the party in possession. Of the earlier cases—prior to the Registration Act of 1877—Balaran Nemchand v. Appa (8) was apparently approved in Sambhubhai v. Shivlaldas,(9) though distinguished from a case where the prior unregistered document being compulsorily registrable was not admissible in evidence at all. In all the Bombay decisions cited above, the reason for withholding preference from the subsequent registered purchase was based, not on the doctrine that registration was constructive notice, for the prior alienation was in most of them unregistered, but upon the long established and undisputed principle that a purchaser is always bound by all the equities of a third party in possession, because possession presupposes title and therefore is notice which ought to put a purchaser on enquiry. In all the cases relied on by appellant as to the inadequacy of constructive notice of

^{(1) (1811) 17} Vesey 433.

^{(2) (1869) 6} Bom. H. C. Rep. 59 at p. 62.

^{(3) (1880) 6} Bom. 168.

^{(4) (1883) 9} Bom. 427.

^{(5) (1882) 6} Bom. 515.

^{(6) (1885) 10} Bom. 105.

^{(7) (1882) 6} Bom. 193.

^{(8) (1872) 9} Bom. H. C. 121.

^{(9) (1867) 4} Bom. 89 at p. 92.

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documents mentioned in a registered deed, this element of the prior purchaser being in possession was wanting, and in such cases mere registration, as held in Inderdawan Pershad v. Gobind Lal (1) and Shan Maun v. Madras Building Co.,(2) was therefore deemed insufficient. The principle on which possession is recognised as an element for consideration in cases of competing purchasers, appears to be quite independent of the now discredited doctrine as to the necessity of possession to the validity of a sale under Hindu and Mahomedan laws. For that principle rests on the English equitable doctrine of notice. It seems hardly necessary to observe that in Trikam v. Hirji (3) possession failed to give priority because it was obtained with constructive notice of a prior registered incumbrance, so that the decision in no way questions the effect to be given to possession under a deed prior to that of a rival purchaser. The operation of registration as constructive notice has been questioned by the other High Courts. But Krishnamma v. Suranna (4) and the cases there cited of Nani Bibee v. Hafizullah (5) and others show that the doctrine of notice by possession has been regarded as standing on another and a sounder footing. The Calcutta High Court regards possession as "very cogent evidence of notice" (Nani Bibee's case), and the Allahabad High Court in Ram Antar v. Dhanauri (6) refused possession to a mortgagee under a registered possessory mortgage, as against a prior unregistered mortgage accompanied with possession, notwithstanding the provisions of section 50 of the Registration Act, 1877. This ruling has been more recently referred to in the Allahabad case of Diwan Singh v. Jadho, Singh, (7) which cites with apparent approval the Bombay case of Hathising v. Kuvarji, (8) which is based on Dundaya v. Chenbasapa (9) and Abool Hossein v. Raghu Nath Sahu, (10) which accepts the principle laid down in Bhalu Roy v. Jakhu Roy,(11) Nemai v. Kokil Bag,(12) and by this Bombay High Court in Waman v. Dhondiba. (13)

(1) (1896) 23 Cal. 790.

(2) (1891) 15 Mad. 268.

(3) (1893) 18 Bom. 332.

(4) (1892) 16 Mad. 148. (5) (1884) 10 Cal. 1073.

(6) (1886) 8 All. 540.

(7) (1896) 19 All. 145.

(8) (1885) 10 Bom. 105.

(9) (1882) 6 Bem. 515,

(10) (1886) 13 Cal. 70. (11) (1885) 11 Cal. 667.

(12) (1880) 6 Cal, 534.

(13) (1879) 1 Bom. 126.

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It is true that the notice referred to in these cases does not in each instance appear to have consisted solely in possession. the general consensus of opinion of all the High Courts, following English decisions, appears to be that possession is at least very cogent evidence of notice which a purchaser cannot with safety disregard, and that section 50 of the Registration Act, 1877, does not do away with the effect of notice, in favour of the registration to which ceteris paribus it gives preference. It appears to be the result of the Bombay decisions that no purchaser can protect himself merely by registering his document of title, against the title of a person in possession of the subject-matter, and if he ignores that possession and fails to make inquiry into its nature and origin, he will be affected by all the equities which the person in possession is proved to have. This being the case, I think that when the plaintiff found that the property of which he bought the equity was in the possession of the defendants, it was for him to inquire into the nature of his vendor's title and the extent of the liabilities to which he was subject. It was contended for respondents that he had actual notice in the shape of direct information. That contention was not substantiated. But he had full knowledge that there was some incumbrance apart from the registered assignment (Exhibit 55), to defendants 7-10. He contends that at most he had constructive notice through that registered document, and that it was not explicit or binding as to Exhibits 57, 58 and 59. But the question is whether he can shield himself under that document as affording him misleading information with regard to his vendor's title. I do not think he can. For the document (Exhibit 55), though not explicit, does mention the further charges and could not relieve the plaintiff from further inquiry. Moreover, it was not the basis of his vendor's title and if there had been no such document in existence, and if defendants 2-6 had never assigned their mortgage rights, the plaintiff finding them in possession would have been no less bound to inquire as to the title of his vendor and the manifest incumbrance on it. And this duty would not have been fulfilled by his assuming, on the discovery of one of the liabilities attaching to the property, that there were no others to support the claim of the person in possession. That is to say, he was not entitled,

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merely because he may have known of the mortgage of 1837, to abstain from all further inquiry and profess that he could not be bound by any other title-deed, however genuine, in favour of the person in possession. The recent case of Hunt v. Luck (1) seems to make this clear in the passage which says: "If a purchaser or mortgagee has notice that the vendor is not in possession of the property, he must make inquiries of the person in possession, of the tenant who is in possession, and find out from him what his rights are, and, if he does not choose to do that, then whatever title he acquires as purchaser or mortgagee will be subject to the title or right of the tenant in possession." And it seems to me that if the Exhibits 57, 58 and 59 are genuine, as the lower Appellate Court has found as a fact they are, the plaintiff is no more exonerated in respect of those documents than he would have been if they had been the only liabilities justifying the possession of the defendants. In the face of Exhibit 55 it would be difficult (if the plaintiff relied on that document as excusing him from further inquiry) to say that the plaintiff had no reason, because he had notice of Exhibit 55, to make any further inquiry. It showed at least that a charge very largely in excess of Rs. 645 was alleged in favour of those in possession, and was, therefore, no excuse for stopping all the inquiry which, had no such document existed, the plaintiff would have been bound to make. The case has been obscured, I think, by arguments as to constructive notice given by Exhibit 55. But it was defendants' possession which gave the real ground for inquiry, and Exhibit 55 would not entitle plaintiff to dispense with any inquiry which he would have been bound to make if that document had never been passed. The case, therefore, seems a very simple one when reduced to its ultimate issues. The lower Appellate Court has found that "on the 3rd December, 1897, plaintiff purchased the equity of redemption from defendant 1 for Rs. 50," and that the defendant I had "mortgaged with possession." It was then for the plaintiff to find out what the state of the title was, and if he did not do so, he would be bound by all the rights proved in favour of the defendants in possession. They lower

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Appellate Court has found as a fact what those rights were, holding Exhibits 57, 58 and 59 genuine. That finding on second appeal is, I think, binding, and though the non-delivery to, and non-production by, the assignees of those exhibits may be ground for suspicion, the finding cannot be interfered with, and it is conceivable that the defendants 2-6 being descendants of the original mortgagees may not at first have been able to lay their hands on those documents, which were of minor importance, and were possibly disregarded at date of the assignment when no question of redemption had been mooted. Had the plaintiff insisted on information being furnished, they might possibly have been brought forward earlier. But there is no allegation that he ever made inquiry and was refused information as to their existence. They have been found genuine. And I think the plaintiff could escape liability for them only by showing that he had made inquiry and had no reason on inquiry to believe in their existence. He cannot now urge that defendants could not or would not have disclosed them on inquiry made. The utmost he can claim is to show that they were actually suppressed or that he was misled on his applying to the defendants in possession for information. This is not a point which seems to have been considered in the Courts below. The lower Appellate Court appears to have treated the case as one in which no such suggestion had been raised in argument. And neither Court has dealt with the case at all with reference to the liability of the plaintiff as a purchaser, who having notice of defendants' possession had abstained from inquiry into the title. The question of limitation as to Exhibits 57, 58 and 59 does not appear to have been urged, those documents being payable according to their tenour, it would seem, only when redemption was claimed, so that till redemption was sought time would not begin to run in respect thereof under article 132, and the point does not seem to have been taken in the lower Courts. The only real questions in the case appear to be (a) whether the defendants' possession was notice which bound plaintiff to inquire, (b) whether, if this be so, he could rely on section 50 of the Registration Act as giving him an absolute priority which could not be affected by the equitable doctrine of notice arising from possession in the

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defendants, and (c) whether, if the plaintiff cannot rely on section 50 of the Registration Act as giving him absolute priority, but was also bound by the possession of the defendants to inquire into the nature and extent of their rights, he had made due inquiry and been misled, or put off his guard or been refused information altogether. This last question is one of fact, which, owing to the view the lower Courts took of the case, was not inquired into and decided, and I would, therefore, send the case back to the lower Court for a decision on the above question, viz., whether the plaintiff did inquire and, if so, whether he was misled, put off his guard or refused information. Return to be made in two months.

ASTON, J.:—The main question in this case is whether appellant Tajudin (original plaintiff) should be treated as fixed with knowledge of the contents of Exhibits 57, 58, 59 when he purchased the plaint lands in 1897 from defendant 1. But certain features in the case require preliminary consideration.

On the 17th December, 1837, the grandfather of defendant 1 mortgaged the plaint lands to one Bapuji Chintaman Bade, the ancestor of defendants 2-6, for Rs. 645-12-3, the mortgage being usufructuary and the profits to be enjoyed in lieu of interest.

The plaintiff Tajudin, on 3rd December, 1897, by registered deed (Exhibit 78) purchased the plaint lands from defendant 1 and became owner of the equity of redemption. He brought this suit to redeem this one mortgage and recover possession on payment of Rs. 645-12-3, the amount of the said mortgage which he sought to redeem.

Defendants 2-6, descendants of Bade, replied that they had transferred their rights to defendants 7-10.

Defendants 7-10 disputed the plaintiff's purchase of the equity of redemption, and replied further that the original mortgagor's sons and daughters had passed other "money bonds" to Bade and that they ought to be parties to this suit: and defendants 7-10 further pleaded that they had purchased the plaint lands from defendant 2 on 12th April, 1893 (under Exhibit 55, a registered document), for Rs. 1,275 and had spent Rs. 1,225 on improving the land, and that the total money due to them on the said mortgage was Rs. 2,500 which ought to be paid to them.

It will be observed that Rs. 2,500 is exactly Rs. 1,275 plus Rs. 1,225 and that there is no mention, in this defence of defendants 7-10, of any claim in respect of any other mortgage or charge. There is no mention of the number, dates or amounts of the other bonds vaguely referred to: they are expressly called "money" bonds, and the plea raised in respect of them is not any claim to increase the redemption money payable, but a plea that the sons and daughters of the original mortgagor should be made parties.

Nor is there any mention in the issues framed in the suit of any mortgage other than the one which the plaintiff Tajudin sued to redeem, that is, the mortgage of 17th December, 1837, for Rs. 695-12-3.

The issues framed were:

- 1. Whether or not the plaintiff's assignment is proved?
- 2. If not, whether or not the plaintiff has a right to bring this suit?
- 3. What amount is due on the mortgage sought to be redeemed, including cost of repairing and improving the property and the payment of *dast* thereon by Bade?
 - 4. If redemption is to be allowed, on what terms can it be allowed?
 - 5. To what relief, if any, is the plaintiff entitled?

The Subordinate Judge first decided that the plaintiff Tajudin's purchase of the equity of redemption (Exhibit 78) was not proved, and dismissed the suit. This decree was reversed in appeal on the finding that "the plaintiff is entitled to redeem the mortgage in question," and the suit was remanded for findings on the other issues and a fresh decision according to law.

After this remand the Subordinate Judge decided, under the third issue already repeated above, that "Rs. 1,130-12-3 are due on account of the mortgage sought to be redeemed," and decreed redemption on payment of this sum with costs in proportion to defendants 7-10.

The above amount, Rs. 1,130-12-3, is in fact made up of Rs. 645-12-3 on account of the mortgage sought to be redeemed and Rs. 242-8-0 plus interest Rs. 242-8-0 on account of three other mortgages not mentioned in the pleadings or issues, disputed by the plaintiff and introduced into the case in the following manner.

The deed (Exhibit 55) of 12th April, 1893, under which the defendants 7-10 purchased from defendant 1, Govind Bhikaji

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Bade, the rights of the original mortgagee for Rs. 1,275, has been translated and runs as follows:

Sale-deed. The 11th of Chaitra Vadya in Shake 1815, the 12th of April, 1893, the cyclical name of the year being Vijaya. On this day (this) sale-deed is passed in writing to Sonya bin Bham Mhetar, Pandya bin Somya Mhetar, Tanya bin Bham Mhetar and Nama bin Bham Mhetar, Chambhars, residing at Panchnadi, by Govind Bhikaji Bade, residing at Kalthare, táluka Dápoli, at present at Ratnágiri. I give in writing as follows: - I have this day taken from you Rs. 1,275, namely, twelve hundred and seventy-five in cash. (In consideration) for the same (I) sell the following property situate at the village of Kashe Panchnadi, sub-district Dápoli, district Ratnágiri. The said property has been with me (i.e., my grandfather) for valivat under a mortgage by a deed dated the 9th of Margshirsha Vadya Shake 1759 (21st December, 1837) from the deceased Bhaudin valad Kutubudin Mukadam of Kolthare for the principal sum of Rs. 645-12-3 and on the security of the same (property) his direct heirs took (i.e., borrowed) from me (from my father) further sums of money and executed documents in respect thereof on stamped papers In addition to this I made repairs, &c., to the said thikán for which money is due to me under the terms of the original deed on account of expenses. Making up the whole account including this (last) item, a very large sum becomes due to me. However, on receiving from you now the amount above mentioned, I have sold to you my right as mortgagee of this property. The said property is as follows: -Survey No. S7, sub. No. 1, area 2 acres and 21 gunthas, assessment Rs. 16-8. I have sold the mortgage right of this property to you as stated above. You should therefore carry on the vahivat thereof from generation to generation through sons, grandsons, &c., pay the Government assessment and take the hot season and rainy season profits in lieu of interest. The profit or loss is yours. Should the owner come to you to pay the mortgage amount within the period prescribed by law, you should receive the amount in accordance with the terms of the deed executed by him, and make over the property to him. If thereby you receive an amount more or less than the amount now received by me, the same shall be yours. Neither myself nor my kinsmen have anything to do with the same. Should any obstruction be caused by my kinsmen as regards the said property, I will remove the same. Also, I shall get the kháta in respect of assessment transferred (to you). I have duly executed this sale-deed, of my own free will and pleasure. The handwriting of Hari Balwant Limaye, inhabitant of Ratnágiri.

It will be seen that there is mention of further sums having been borrowed on the security of the same property, but the further documents as to which no particulars are given as to number, date or amount are not called mortgage-bonds, but are called "documents on stamped papers." Mention is made of an account being made up which by including expenses for repairs

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(since 1837) amounted to a "very large sum." There is no express statement that the debts subsequently incurred were assigned to the persons in whose favour Exhibit 55 was passed, and the words "I have sold to you my right as mortgagee of this property," read with the express mention of the mortgage of 1837 and the passage later on "Should the owner come to you to pay the mortgage amount within the period prescribed by law, you should receive the amount in accordance with the terms of the deed executed by him and make over the property to him," are sufficiently general to leave room for contention that this was a sale of the mortgage rights under the mortgage-deed, Exhibit 56 of 1837, and nothing more. It was contended for the appellant Tajudin (original plaintiff) that this was clearly what defendants 7-10 understood as shown by their written statement and defence to this suit, already described above, as well as by the fact that none of these further bonds called "money bonds" by defendants 7-10 were made over by defendant 1 to defendants 7-10.

It appears, however, that at the hearing of the suit there were produced from the custody of defendant 2, Govind Bhikaji Bade (who, it will be remembered, was the person who executed Exhibit 55), three bonds purporting to be more than thirty years old but unregistered. They are Exhibits 57, 58, 59. They purport to create further charges on the property mortgaged in 1837, and to be dated March 1864, February 1865, and March 1863, and two of them to have been executed by Salaudin, father of defendant 1, and the third by Fatmabibi, a daughter of the original mortgagor, the grandfather, of defendant 1. The first is for Rs 57-8-0, the second for Rs. 95 and the third for Rs. 90—in all Rs. 242-8-0—and the rate of interest fixed in each is twelve per cent.

The Subordinate Judge, without discussing the custody from which these three unregistered documents had come into Court considered them proved by the evidence of witness 61 and because defendant 2 (who has no interest in the plaint property) admits all these mortgages in his examination (Exhibit 60).

The Assistant Julge who decided the appeal does not mention the evidence of witness Exhibit 61, but held these three bonds

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The Assistant Judge, holding that the rule of dúmdupat does not apply where the original mortgagor was a Mahomedan, varied the decree in the cross appeal of defendants 7-10 by raising the Rs. 485 calculated by the Subordinate Judge as due under these three bonds to Rs. 1,192-7-7, making the total amount payable by plaintiff Tajudin for redemption Rs. 1,838-5-10 instead of Rs. 1,130-12-3.

It has been contended for the appellant Tajudin (original plaintiff) that the lower Appellate Court's finding of fact that Exhibits 57, 58, 59 are genuine documents is vitiated by the method by which this conclusion is arrived at, because the Assistant Judge seems to have dispensed with formal evidence as to their execution by treating them as ancient documents coming from proper custody and by drawing the presumption permissible under section 90 of the Evidence Act (I of 1872) as to handwriting, execution and attestation.

This contention would be sound if the Assistant Judge had really adopted such a presumption, under section 90 of the Evidence Act, as the basis of his decision that Exhibits 57, 58, 59 are genuine.

Illustration (a) to section 90 says:

A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land showing his titles to it. The custody is proper.

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The "particular case" in the present suit is the exact converse. The defendants 7-10, under the new case they set up at a later stage of the suit, claimed to have become assignees under Exhibit 55 passed by defendant 2 of the three several debts charged upon the plaint property by Exhibits 57, 58, 59, and they produced the latter three documents from the custody of defendant 2 when, according to the case for defendants 7-10, these three documents (Exhibits 57, 58, 59) ought to have been produced from their own custody if these particular charges became assigned to them under Exhibit 55 by defendant 2 in April, 1893.

But though the Assistant Judge describes the custody of defendant 2 as "not improper," he seems to have merely meant that he preferred to believe that defendant 2 had overreached defendants 7-10 and had improperly retained documents he should have handed over to defendants 7-10, rather than believe that Exhibits 57, 58, 53 are fabricated or that other bonds—simple money bonds—have been suppressed by defendants 7-10.

In fact, the judgment says that Exhibits 57, 58, 59 should have been handed over by defendant 2 to defendants 7-10 when Exhibit 55 was passed: in other words, the proper custody in this particular case for Exhibits 57, 58, 59 is the custody of defendants 7-10 from which they were not produced. There cannot, I think, be two different proper custodies for any document at a given time in any particular case. I agree, therefore, with the view of the lower Appellate Court that if Exhibits 57, 58, 59 had been produced in this particular case from the custody of defendants 7-10 they would have come from proper custody. They did not come from the custody of defendants 7-10, who, therefore, cannot obtain advantage from the provisions of section 90 of the Evidence Act. The explanation suggested by the Assistant Judge as to why they came from defendant 2 may help to remove suspicion as to their being genuine, but it does not relieve defendants 7-10 of the necessity of proving Exhibits 57, 58, 59 independently of the provisions of the said section. Nevertheless, I read the judgment of the lower Appellate Court as recognising this and as basing the finding of fact, that these unregistered Exhibits 57, 58, 59 are genuine and are the identical documents on stamped papers referred to in

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There remains the question whether it was rightly decided that the appellant Tajudin is bound to pay the charges created by Exhibits 57, 58, 59 in addition to the mortgage-debt of Rs. 645-12-3 before he can recover possession of the plaint property from defendants 7-10.

The plaintiff's purchase from defendant I of the equity of redemption in 1897 by Exhibit 78 is registered, whilst Exhibits 57. 58, 59 are not registered. Section 50 of the Registration Act (III of 1877) "confers priority on documents required to be registered and accordingly registered since Act III of 1877 was passed over all prior unregistered documents of an antagonistic character": Jethabai v. Girdhar.(1) But "in spite of the large words of the enacting part this Court has consistently limited them to the cases where the subsequent purchaser has no notice of the prior unregistered conveyance": Keshav v. Vinayak. (2) The respondent's pleader, relying, therefore, on the equitable dectrine of notice, contended that by reason of the registration of the deed of assignment (Exhibit 55) passed by defendant 2 in April, 1893. the appellant-plaintiff had notice of the transactions set out in the unregistered documents (Exhibits 57, 58 59), so far as they can be taken to be dealt with by Exhibit 55. This contention is sufficiently met by the decision in Chunilal v. Ramchandra, (3) where it was said by Farran C.J., "the register may be notice." and in most cases under the rulings of this Court doubtless is, of the registered documents which it contains, but it would be pushing the doctrine of constructive notice beyond all bounds to hold that it is notice of the unregistered documents under which the holders of registered documents derive their title."

But possession being equivalent to notice of such title as the person in possession may have, both under Hindu. Mahomedan and English laws (see *Lakshmandas* v. *Dasrat* (4)) and the respondents being in possession as assignees of the usufructuary mortgage of 1837 when appellant bought the equity of redemption from defendant No. 1 in 1897, the point has been raised, without,

^{(1) (1895) 20} Bom. 158.

^{(2) (1893) 18} Bom. 355.

^{(3) (1896) 22} Bom. 213.

^{(1) (1882) 6} Bom. 103.

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however, any argument being specially directed to it at the hearing, whether such possession was notice to appellant of the subsequent charges purporting to be created by the unregistered Exhibits 57, 58, 59.

In equity it is sufficient to charge a man with knowledge that he had that before him which, if he had used due diligence, would have afforded the knowledge he desires: per Lord St. Leonards in Spackman v. Evans, (1) quoted by Couch, C.J., in Mancherji v. Kongseoo, (2) where, on the English authorities cited, the duty to make inquiry into the title when the vendor is not in possession is insisted upon. In the case of Mancherji v. Kongseoo there was neglect to make such inquiry. In the case of Kanayalal v. Pyarebai (3) it was said by Melvill, J.: "Had he taken up another line of defence we might perhaps have given him an opportunity of showing that at the time of his purchase he did make inquiries and was informed and believed that the mortgage had been foreclosed."

In Patman v. Harland, (4) where it was held that a purchaser or lessee having notice of a deed passing part of his vendor's or lessor's title has constructive notice of the contents of such deed. it was said by Jessel, M.R.: "Supposing you are buying land of a married man, as in Jones v. Smith, (5) and you are told at the same time that there is a marriage settlement but the deed does not affect the land in question, you have no constructive notice of its contents, because although you know there is a settlement you are told it does not affect the land." And again at page 358: "Therefore I think there was sufficient to put the lessee off his guard."

In Williams v. Williams (6) it was said by Kay, J.: "These questions of notice and of the effect of notice are some of the most difficult questions which a Court of Equity has to deal with, and I cannot help feeling that we must be very careful not to strain the doctrine of notice too far and to make it involve consequences of liability to persons who may be practically innocent." And again at page 443: "If a man has notice that there is a deed

^{(1) (1868) 3} E. and 1 App. 171 at p. 221.

^{(2) (1869) 6} Bom. H. C. 59.

^{(3) (1883) 7} Bom. at p. 145.

^{(5) (1841) 1} Hare 43.

^{(6) (1881) 17} Ch. D. at p. 442.

^{(4) (1881) 17} Ch. D. 353.

SHARFUDIN v. Govind. or document and at the same time has notice that that deed or document is entirely worthless or does not affect the property with which he is going to deal, he is put so completely off his guard that a Court of Equity does not treat him as fixed with knowledge of the document or the effect of it."

Under section 3 of the Transfer of Property Act (IV of 1882) a person is said to have "notice" of a fact when he actually knows that fact, or when but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent, under the circumstances mentioned in the Indian Contract Act, 1872, section 229.

Now in the present case though defendants 1 and 2 after parting with all their respective interest in the plaint land have shown a readiness to support the belated claim of defendants 7-10 to hold the plaint land subject to the charges purporting to be created by Exhibits 57, 58, 59 after the mortgage of 1837, it does not follow that this was the attitude adopted by defendants 1 and 2 all along.

The reference in Exhibit 55 to other documents on stamped paper is vague and the written statement of defendants 7-10 does not suggest any belief on the part of these defendants that they held the plaint land subject to any such further charges. They in fact resisted redemption until they were paid Rs. 1,275, the price paid to defendant 2, and Rs. 1,225 for improvements, and they described the later bonds as "money bonds" without basing any claim upon them.

There is nothing on the record to show that the plaintiff made no inquiry when he purchased the equity of redemption from defendant 1, nor does the written statement of defendants 7-10 suggest that any such inquiry would have led to an assertion by defendants 7-10 in 1887 of any claim under Exhibits 57, 58, 59 or to the production of those documents which were not in the custody of defendants 7-10 at any time.

The claim put forward under Exhibits 57. 58, 59 is, as already pointed out, a later development of the defence. The point whether Tajudin was fixed with knowledge of the contents of Exhibits 57, 58, 59 by means of the possession of defendants 7-10

rights of defendants 7-10.

is a still later development, and Tajudin, the appellant-plaintiff, has not been given a proper opportunity to meet the new case thus brought forward for the defendants 7-10. For the above reasons I concur entirely in the view that this appeal cannot be decided on the ground that plaintiff was at the time of his purchase fixed with the knowledge of the charges purporting to be created by Exhibits 57, 58, 59 until the plaintiff has been given the opportunity to show whether at the time of his purchase from defendant 1 he did make inquiries as to the possession of defendants 7-10, and with what result, so that it may be ascertained whether he was offered the same information as that given in the written defence of defendants 7-10 and was misled or put off his guard as to the nature and extent of the

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Issue sent down.

PRIVY COUNCIL.

HAJI SABOO SIDICK AND OTHERS (DEFENDANTS) v. AYESHABAI AND ANOTHER (PLAINTIFFS).

Hindu law—Outchi Memons—Marriage, evidence of, where disputed— Omission to mention nika wife in will made after marriage—Unchastity of widow as disentitling her to maintenance—Charge not specifically raised in pleadings or issues.

The omission, in a will made after an alleged nika marriage, of all mention of the nika wife, is, so far as it goes, an item of evidence against the marriage having taken place; but its cogency must depend on whether the circumstances of the marriage made it natural that the wife should be an object of the husband's testamentary bounty and improbable that he should have left her to depend on her legal right to maintenance. In this case it was held that the circumstances of the marriage made it not unlikely that the testator would have taken the latter course.

A draft of the will, written by a person other than the testator, tendered as furnishing similar evidence to that afforded by the will, was held to be rightly rejected as evidence, not being a written statement by the testator.

* Present: LORD DAYEY, LORD ROBERTSON, SIR ANDREW SCOELE, and SIR ARTHUR WILSON.

P. C.* 1903. March 19 and April 30.

Haji Saboo Sidick r. A charge of unchastity as disentitling a widow to maintenance must be specifically raised in the pleadings or issues. Where there was no averment of, nor issue as to such unchastity, it was held that the defendants could not found any such allegation on their general denial in the pleadings that the plaintiffs (the widow and her daughter) were entitled to maintenance, and on an issue "whether the plaintiffs are entitled in any event to maintenance or marriage expenses."

APPEAL from a decree (28th February, 1901) of the High Court at Bombay, varying a decree (3rd July, 1900) of the same Court in its original jurisdiction.

The suit out of which the appeal arose was instituted on 30th September, 1899, by the respondents Ayeshabai and Mariambai, who were Mahomedans, alleging themselves to be the widow and daughter, respectively, of one Haji Haroon Sidick, and in that capacity making claims on his estate.

Haji Haroon Sidick was a Cutchi Memon, a member of a class of persons who being originally Hindus became converts to Mahomedanism, but retained the Hindu law of inheritance.

The defendants were Haji Saboo Sidick and Haji Adam Sidick (the two brothers of Haji Haroon Sidick), Rahimtoollah Abd Rahim, Abdulla Abd Rahim, and Fatmabai (admittedly a widow of Haji Haroon Sidick).

The plaint stated that Haji Haroon Sidick died on 20th December, 1898, possessed of considerable property, of which the first four defendants were in possession. The plaintiffs claimed that the two widows were entitled to the whole of the estate, after provision being made for the maintenance and marriage expenses of Mariambai. In the alternative they claimed to be entitled to a share of the estate, or in any case to maintenance out of it.

The defendants filed a joint written statement, in which they denied that the plaintiffs were the wife and daughter of Haji Haroon Sidick and asserted that the defendant Fatmabai was the only widow. They set up a will and codicil of the deceased, of which the first four defendants were the executors, in which there was no mention of the plaintiffs, and under which the defendant Fatmabai was entitled to certain legacies in her favour. The defendants denied that the plaintiffs had any claims, as alleged, to the estate of the deceased testator.

It was proved that the will and codicil set up by the defendants were duly made by the deceased, and that is not in dispute in this appeal.

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The only issues now material are:

- 1. Whether the first plaintiff is the widow and the second plaintiff the daughter of the deceased, as alleged?
- 5. Whether the plaintiffs are entitled in any event to maintenance or marriage expenses, and if so to what amount out of the estate?
 - 6. Generally.

The Judge of the High Court in its original jurisdiction (Russell, J.) held that the first plaintiff was the widow, and the second plaintiff the daughter, of Haji Haroon Sidick; that the former was entitled to maintenance from 20th December, 1898, at Rs. 375 a month; and he allowed Rs. 2,000 for the marriage expenses of the latter, to be deposited with the Accountant General to the credit of a fund in her name and invested in Government paper, to be paid with its accumulated interest to her guardian at such time as she was to be married: in the event of her death that sum and the interest to be repaid to the defendants. The maintenance was declared to be a charge on the immoveable property of the testator. With reference to the question of maintenance, the Court said:

I was asked to raise an issue on unchastity. I declined to allow it for three reasons. It was sought to be raised almost at the end of defendants' case. I should have been obliged to re-hear the whole case to enable plaintiff to disprove facts. That would have been an injustice and waste of public time. Evidence has been directed to prove plaintiff was a prostitute. This was only relevant on the question whether the marriage was probable or not. Having held that the issue of unchastity could not be raised, I allowed no evidence to be taken about it.

From this decision both parties appealed: the defendants on the ground that the Court was not justified in finding on the evidence that the plaintiffs were wife and daughter of the deceased; that it was not proved that a nika marriage took place between the deceased and Ayeshabai; that it ought to have been held that Ayeshabai was leading the life of a prostitute at the date of the alleged marriage; that the Court was in error in excluding evidence tendered by the defendants to prove that

Haji Saboo Sidick v Ayeshabal she continued to lead the life of a prostitute after the alleged marriage and after the death of the testator; that the amount of maintenance awarded was excessive and ought to be reduced; that maintenance should only be paid to her during widowhood and so long as she remained chaste; and that the Rs. 2,000 awarded to the second plaintiff was excessive and ought to be reduced.

A Bench of the High Court (Candy and Whitworth, JJ.) sitting to hear appeals from the original civil jurisdiction of the Court affirmed the finding of Russell, J., that Haji Haroon Sidick had contracted a nika marriage with Ayeshabai and that she was his wife at the time of his death. They also held (referring to Mahomed Sidick v. Haji Ahmed (1) per Scott, J., at page 13 of the Report), that Haji Haroon Sidick as a Cutchi Memon was governed by Hindu law, and according to that law Ayeshabai was entitled to maintenance even though she had been unchaste before and after marriage. As to this and as to the quantum of maintenance suitable, they said:

The learned counsel for defendants contended that Ayeshabai was entitled to no maintenance at all because Haji Haroon could at any time have divorced her. But that is no answer to the plaintiffs' claim. The question is not what Haroon could have done, but what he did do. As a fact he did not divorce her, and she was his nika wife at the time of his death. Therefore, according to Mahomedan law, she would be one of his heirs, while if she cannot inherit according to Hindu law she is entitled to maintenance. So, too, with the argument that Ayeshabai had led an unchaste life before and after her marriage. The fact, if established, might be an argument in favour of the heir that it was not probable that Haroon would have married her. But if as a fact he did marry her, and did not divorce her, she is entitled to maintenance, whatever may have been her past life.

Now, no doubt, in considering the quantum of maintenance to be allowed to Ayeshabai the main element to be considered is the value of Haroon's estate, and when, as here, there is a Master attached to the Court, the usual course is a reference to the Master. But this is not imperative, and we are reluctant at this stage to protract the litigation by a reference unless that course is absolutely necessary. There is nothing on the record to show that a reference was directly asked for. The learned Judge took the estimate which was given by the managing clerk of Haroon's solicitors, which agrees with the value given in the will. Taking the estate at nine lakhs the learned Judge allowed one-third, i.e., three lakhs, to the two widows, giving half, i.e. Rs. 1,50,000, to Ayeshabai. The

interest of that at three per cent. would amount to Rs. 4,500 or Rs. 375 per mensem. The learned counsel for defendants admitted that Haroon was a very wealthy man, and he said that it might be assumed that the estate was at least worth five lakhs. We do not think it necessary that there should be any further investigation as to the value of the estate. For there are other elements to be considered which, in our opinion, necessitate a considerable reduction of the amount allowed by the learned Judge. It is obvious that Ayeshabai is not in the same position as the senior widow Fatmabai, who was the shadi wife of Haroon, who lived with him in his own house as his acknowledged wife, and who enjoyed far greater comforts than Ayeshabai, the nika wife, whose marriage was concealed from the world and who lived in hired rooms in a humble condition of life.

The evidence as to status of Ayeshabai is so clear that we have no hesitation in saying that the sum of Rs. 200 per mensem is an ample allowance for her and her daughter, and that, when the daughter is married, this allowance should be reduced to Rs. 150, which will be amply sufficient to maintain Ayeshabai decently and with due regard to her position which she enjoyed as the nika wife of the deceased.

We think also that there should be a direction in the decree that Ayeshabai's maintenance will cease on her re-marriage, should she re-marry, and that it is conditional on her remaining chaste.

As to the marriage expenses of the daughter, we are not disposed to interfere with the direction of the learned Judge. There is certainly no reason to increase the sum.

Sir W. Rattigan, K.C., and H. Cowell for the appellants contended that the alleged marriage between Haji Haroon Sidick and Ayeshabai was not sufficiently proved. Had she been his wife, and Mariambai his daughter, they would have been mentioned in his will, which makes no mention of them. The draft of the will tendered in confirmation of this should have been admitted in evidence. But, assuming the marriage did take place, Ayeshabai's claim to maintenance has been forfeited by her unchastity. There was, it is true, no specific issue as to her having been unchaste; but, it was submitted, the denial in the pleadings that she was entitled to maintenance, and the fifth issue " whether the plaintiffs are entitled in any event to maintenance or marriage expenses," enabled the appellants to show any ground for depriving her of it. When the first Court held that this could not be done, the appellants should have been allowed to raise a specific issue, and evidence of the unchastity ought not to have been excluded. The amount of maintenance

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J. Jardine, K.C., and C. W. Arathoon for the respondents were not heard.

The judgment of their Lordships was on the 30th April, 1903, delivered by—

LORD ROBERTSON:—The respondents were the plaintiffs in a suit brought to assert their rights as one of the widows and a daughter, respectively, of one Haji Haroon Sidick, a merchant of Bombay, who died on 20th December, 1898. The plaint was filed on 30th September, 1899. It originally raised, inter alia, the question whether Haji Haroon Sidick died intestate, but it is not now disputed that he left a will, under which the appellants, other than Fatmabai, are the executors. Fatmabai is admittedly a widow of the deceased. The appellants on 24th November, 1899, filed a joint written statement, and issues were settled on 18th June, 1900.

The main question raised by the plaint was whether the deceased had entered into a niku marriage with the respondent Ayeshabai. This was keenly disputed, the case of the appellants being that at the alleged marriage ceremony the deceased had been personated. On this pure question of fact there are concurrent judgments in favour of the respondents; and accordingly their Lordships have not been invited to reconsider its merits. The appellants confined their argument to four matters, the first of which is, in truth, inseparable from the merits:

1. At the trial it was proved that the deceased had executed a will, after the alleged marriage, and in it there was no mention made of either of the respondents. So far as it goes, this is an item of evidence against the marriage having taken place; but, at best, it is only an item more or less cogent, and its cogency must depend on whether the circumstances of the marriage made it natural that the wife should be an object of the husband's testamentary bounty and improbable that he should have left her to depend on her legal right to maintenance. In the present instance the Courts below have thought that the circumstances

of this marriage made it not unlikely that the testator should take the latter course. It is obvious not only that this is a very tenable view of the question, taken by itself, but also that the point raised by the appellants could only be made anything of by weighing it in relation to the whole evidence on which the Courts below have concurrently preferred the respondents' contention.

2. A draft of the will, also containing no mention of the respondents, was tendered in evidence, apparently as of itself furnishing similar evidence to that afforded by the will. This draft, however, was written not by the testator but by another person, and in their Lordships' judgment it was rightly rejected. This was not a written statement made by the deceased.

3. At the trial, questions were put and disallowed, which went to show that Ayeshabai had been unchaste after the death of her husband and had thus (as the appellants contended) disentitled herself to maintenance. On the record as it stood, the appellants had neither averment nor issue of such unchastity, and all that they could point to was their denial that "the plaintiffs" were entitled to maintenance, and the fifth issue, whether "the plaintiffs are entitled in any event to maintenance or marriage expenses." It is manifest that those general words, equally applicable to mother and child, are entirely unsuitable for the statement of the specific fact of incontinence on the part of the mother, and the words of the fifth issue are in fact an echo of the plaintiffs' own pleading.

The appellants sought to better their position by applying for leave formally to raise the issue whether, in the event of the plaintiff Ayeshabai being entitled to maintenance from the date of the deceased's death, she has not forfeited such right by unchastity; and, on this application being refused, the appellants applied for leave to file a supplemental written statement raising the question of unchastity. Both applications were refused. Both were made after the plaintiffs' case was closed. It appears to their Lordships that it was out of the question that, after the plaintiffs' case was closed, this new averment should be made, necessitating as it did the opening up of the whole case, without any suggestion that the facts relied on had newly come to the knowledge

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Haji Saboo Sidick v. Ayeshabai. of the appellants and had before been excusably unknown to them.

The proposal that this matter should now be re-opened is the more unreasonable as the decree appealed against contains a dum casta clause.

4. The only other point was as to the amount of aliment. No cause whatever has been shown for interfering with the careful decision immediately under review, which modified the decree of the Judge of first instance.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants—Messrs. Payne and Lattey.
Solicitors for the respondents—Messrs. T. L. Wilson & Co.

PRIVY COUNCIL.

P. C.* 1903.

April 28, 29. May 12. VERABHAI AJUBHAI AND OTHERS (PLAINTIFFS) v. BAI HIRABA
AND OTHERS (DEFENDANTS).

Hindu Law—Adoption—Chudasama Gameti Garasias—Custom prohibiting adoption—Effect on adoption of the natural son having survived his futher and attained ceremonial competence.

A custom alleged to exist in the Hindu caste of Chudasama Gameti Garasias prohibiting adoption was held to be not proved.

A member of that caste died in 1887 leaving a widow and a son, who died in 1889 between fifteen and sixteen years of age and unmarried. In 1891 the widow adopted a son to her husband.

Held, that the adoption was valid.

It was contended that the adoption was invalid on the ground that the natural son had survived his father and lived to attain ceremonial competence. Both the Courts below found that he was a minor and unmarried when he died.

Held, that as there appeared to be no fixed age at which a Hindu boy was supposed to have attained ceremonial competence, and as there was no proof in

^{*}Present: Lord Macnaghten, Lord Lindley, Sir Andrew Scoble, and &c. Sir Arthur Wilson.

this case that the son had, or was treated as having, attained such competence, the objection was not sustained.

VERADUAI AJUBUAI

BAT HIRABA.

APPEAL from a decision (24th June, 1896) of the High Court at Bombay, which affirmed a decision (30th October, 1893) of the Subordinate Judge of Ahmedabad by which the appellants' suit was dismissed.

The suit was brought by some of the surviving male descendants of one Bhojaji and his wife Nanibai to set aside a deed of adoption and an alleged adoption of one Raesangji purporting to have been made by Hiraba, widow of Hamjibhai Waghabhai, a grandson of Bhojaji, and for a declaration that they and the other surviving male descendants of Bhojaji were entitled after the death of Hiraba to the estate of Hamjibhai Waghabhai.

Bhojaji and Nanibai had five sons. Of these Waghabhai had one son, Hamjibhai Waghabhai, who married Hiraba. Hamjibhai died on 3rd June, 1887, leaving him surviving his widow Hiraba, three daughters, and a son Lalubha. Lalubha died unmarried on 25th August, 1889, being then between fifteen and sixteen years of age, having been born in December, 1873.

All the parties to the suit belonged to the Hindu caste of Chudasama Gameti Garasias, which caste inhabits certain talukas in the district of Ahmedabad and the province of Kathiawar.

On 13th July, 1891, Hiraba executed a deed purporting to adopt Raesangji Harbhamji as her son. The plaintiffs on 23rd September, 1892, instituted the suit, out of which this appeal arose, against Hiraba, Raesangji, the three daughters of Hamjibhai Waghabhai and others, alleging in their plaint that according to the custom of their caste a son could not be validly adopted, disputing the fact of the ceremony of adoption having taken place as alleged, and asserting that in any event it was void as having been carried out from corrupt motives and for other reasons. The plaint further alleged that by the custom of their caste the daughters of Hamjibhai were excluded from inheritance, and that the plaintiffs and defendants 3 to 8 were the persons then entitled on the death of Hiraba to succeed to the estate of Hamjibhai.

Written statements were filed by the defendants Hiraba, Raesangji and some of the others, in which the plaintiffs' allega-

VERABHAI AJUBHAI v. BAI HIRABA. tions and contentions, except as to the custom of exclusion of daughters from inheritance, were disputed.

The only issues material on this appeal were:

- 5. Is the custom prohibiting adoption, as alleged in the plaint, proved?
- 6. Is the alleged adoption proved? If so, is it in any way invalid?

The Subordinate Judge held that the special custom of inheritance was not proved save as regarded the exclusion of daughters; that the plaintiffs were not entitled during Hiraba's lifetime to a declaration as to who would succeed on her death to the estate of Hamjibhai Waghabhai; that the alleged custom prohibiting adoption was not proved; and that the adoption was proved and was not invalid either on the ground of the motives inducing the same or the survival by Lalubha of Hamjibhai. The Subordinate Judge therefore dismissed the suit.

From his decision the plaintiffs appealed to the High Court, and the appeal came before a Division Bench of that Court (Farran, C.J., and Hoskin, J.), the material portion of whose judgment was as follows:

The points which have been argued in support of the appeal are that the custom of the Chudasama Garasias prohibiting adoption has been proved; that the alleged adoption has not been proved; and that Hiraba having had a natural son Lalubha, who survived his father Hamjibhai, could not legally adopt a son-

It is contended that as Garasias are admittedly not bound by Hindu Law as to daughters, there is no presumption that the Hindu Law as to adoption is applicable. The object of the exclusion of daughters * appears to be

to prevent the lands going by marriage to persons not belonging to the original proprietary families. A custom not to adopt might perhaps arise from a similar motive. Where, however, such a custom is set up, it ought, to use the words of Sir Charles Sargent in Patel Vandravan Jekisen v. Patel Manifed Chunilal (1) "to be established by very clear proof that the conscience of the members of the caste had come to regard it as forbidden." In that case, although two hundred and two witnesses spoke to the existence of such a custom, it was held not to be proved. In the present case only thirteen witnesses have given evidence as to the existence of the alleged custom. These witnesses do not say that there is any rule of the caste prohibiting adoption. They merely state that it has not been the practice to adopt. One of these witnesses, Wajesing (Exhibit 50), who has himself brought a separate suit to

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have the adoption set aside, deposed in a suit brought in 1886 before the disputed adoption, that adoption is allowed among Garasias (Exhibit 61). Ajubhai, one of the (plaintiffs) appellants, also stated, in the same former suit, that he had heard of an adoption by a Chudasama Garasia of Wagad (Exhibit 85). It is admitted that a Chudasama Garasia widow named Baiba adopted a son at Rojaka about thirteen years ago. It is now stated to this Court on affidavit that adoption has been set aside in a recent suit. There is, however, no allegation that any proceedings were taken by the caste against

* This is a misdescription. The original work is in Gujarati. It is a compilation of answers of various castes in the Surat and Broach Districts as to their customs collected about the year 1827 under the direction of the Sadar Divani Adalat and published, Vol. I in 1834 and Vol. II in 1857.

Baiba for contravening the alleged custom. The Subordinate Judge says in his judgment: "In Borradaile's Caste Rules, Gujarati Translation, Vol. II, page 418, it is stated that there is no custom to adopt a son with religious ceremony, but that a pálak son is taken without any ceremony. This shows that there is a custom allowing a pálak son in place of an adopted son among the Garasias."

It is contended for appellants that a pálak or foster-son stands upon an entirely different footing from an adopted son. This is, no doubt, the case now under the rulings of the Courts. West and Bühler say at page 927: "The foster-son, however, has always been frowned on by the Shastris. He has failed to get recognition from the Courts" (Nilmadhab Das v. Biswambhar Das(1).) Again they say at page 1087: "A mere deed or declaration by the alleged adoptive father that he has taken a boy as a foster-son (pálak putra) does not produce the effect of adoption"; and at page 1202: "The Hindu Law does not recognize any legal status for the foster-son, either in the matter of performing ceremonics or of inheritance."

As appellants rely upon the answers given by the Garasias recorded in the compilation referred to by the Subordinate Judge, those answers must be taken in their entirety, and not only the part favourable to appellants.

Upon referring to them we find that the Garasias gave the pâlak son all the rights of a legitimate son as to the performance of ceremonies and as to inheritance:

Answer 5. * * * * " The palak son performs the kriya of his adoptive father."

Answer 6. "The pálak son inherits in every way like a legitimate son."

Answer 7. "If a legitimate son is born after taking a palak son, they both inherit equally."

Answer 8. "A widow who has not a son of her own may take a pálak son." (Borradaile, Vol. II, page 418; see also Note C, page 1213, West and Bühler.)

It is evident, therefore, that the custom of taking a foster-son instead of an adopted son was not due to any intention to exclude the foster-son from succession, and adoption with the usual ceremonies can scarcely have been against the conscience of members of the caste, though it was not formerly c ustomary. It

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There is sufficient evidence as to the adoption to leave no reasonable doubt as to the giving and taking having been duly performed. The ill-feeling of other members of t he family prevented the adoption being as public as it might otherwise have been, but as it is in part evidenced by a registered deed, there can be no reason to suppose that any necessary formalities were omitted.

The last contention we have to deal with is that as Hiraba's son Lalubha survived his father, she had no power to adopt. Hamjibhai died in 1887. Lalubha was born in December, 1873, and died in August, 1889: he therefore died before completing his sixteenth year and while still a minor according to the Hindu Law prevailing in this Presidency, and it is admitted that he was never married. The law on the subject of a second adoption was considered by Mr. Justice Ranade in Gavdappa v. Girimallappa. (1) He says: "In this Presidency no express authorization by the husband is necessary, but the widow's power to adopt, when there are no other vested rights which would be defeated by it, has been fully recognised in Ramji v. Ghamau. (2) In the higher castes it is usual to permit such an exercise of power when the son dies before he attains full ceremonial competency, and cases of a second and third adoption under such circumstances have occurred."

It is alleged for the appellants that Lalubha performed the funeral ceremonies of his father Hamjibhai. There is no evidence on the point, but assuming this to have been the case, still, as he died while a minor and unmarried, he had not attained full ceremonial competency.

This action was tried by an experienced Hindu Judge, doubtless well acquainted with the customs of his own country—Gujarát. We have, therefore, the less hesitation in accepting his findings as correct.

The High Court dismissed the appeal and affirmed the decision of the Subordinate Judge. The plaintiffs appealed to His Majesty in Council.

J. Jardine, K.C., R. J. Parker, and S. R. Rana for the appellants contended that the adoption made by Hiraba was invalid, firstly, as being forbidden by the custom of the caste to which the parties belonged, and on the evidence it was submitted that the appellants had proved the special custom they alloged prohibiting adoption. Important members of the caste had deposed that amongst them adoption did not take place and was not recognised. An adoption stated by the respondents to have taken place in the caste had been shown to have been treated

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as being invalid and had been set aside. Borradaile's Gujarát Caste Rules, Vol. II, page 418, was referred to. Secondly, the adoption was invalid on the ground that, as Lalubha survived his father and had at the time of his death in 1889 attained ceremonial competence, his mother had no right to adopt a son. Having succeeded as heir to her son, it was submitted, an adoption purporting to be made to her husband and under an implied authority from him was invalid, her power to adopt having become extinguished. Reference was made to Bhoohem Moye Debia v. Ram Kishore Acharjes (1); Padmakumari Debi Chowdhrani v. Court of Wards (2); Thayammal v. Venkatarama (3); Venkata Krishna Rao v. Venkata Rama Lakshmi (4); Krishnarav Trimbak Hasabnis v. Shankarrav Vinayak Hasabnis (5); Gavdappa v. Girimallappa (6; Awava v. Mahadganda (7); Payapa Akkapa Patel v. Appunna (8); Venkappa v. Jivaji (9); Vasudeo Vishnu Munokar v. Ramchandra Vinayak Modak (10); Patel Vandravan Jakisan v. Patel Manilal Chunilal (11); Ramchandra Bhagavan v Mulji Nanabhai (12); and West and Bühler's Hindu Law, 3rd Edition, pages 985, 986. As to Lalubha having attained ceremonial competence, the case of Rajendru Narain Lahooree v. Saroda Soondaree Debee, (13) which was cited with approval in Jamoona Dassya v. Bamesoonduree Dassya, (14) was referred to as showing that ceremonial competence might be attained before actual majority by Hindu Law was reached.

The judgment of their Lordships was on the 12th May, 1903, delivered by—

LORD LINDLEY:—The appellants, who represent the original plaintiffs, are male descendants of one Bhojaji. He had a grandson named Hamjibhai, who died leaving a widow Hiraba and a son Lalubha surviving him. Lalubha died a minor and unmarried, but he was fifteen or sixteen years of age when he died.

- (1) (1865) 10 Moore's I. A. 279 (309, 311).
- (2) (1881) 8 I.A. 229 (214); 8 Cal. 302 (309).
- (3) (1887) 14 I. A. 67; 10 Mad. 205.
- (4) (1876) 4 I. A. 1; 1 Mad. 174
- (5) (1892) 17 Rom. 164.
- (6) (1894) 19 Bom. 331 (336, 337).
- (7) (1893) 22 Bom. 416 (419).

- (s) (1893) 23 Bom. 327 (330, 331).
- (9) (1900) 25 Bom. 306 (309).
- (10) (1896) 22 Bom. 551.
- (11) (1890) 15 Bom. 565; (1891) 16 Bom. 470.
- (12) (1896) 22 Bom. 558 (561).
- (13) (1871) 15 W. R. 54S.
- (14) (1876) 3 I. A. 72; 1 Cal. 289,

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After his death Hiraba, the widow, adopted the son of a relative of her late husband. The validity of this adoption is contested by the appellants on two grounds, viz., (1) that adoption is not allowed by the custom of their caste; (2) that if it is, yet that as Lalubha survived his father and attained the age of ceremonial competence, there was no occasion or justification for any adoption.

In the Courts below the then plaintiffs attempted to impeach the validity of the adoption on the ground that it was not bond fide, but was attributable to corrupt motives and inducements. This ground of invalidity was, however, abandoned in the course of the argument before their Lordships, and no further notice of it will be taken.

All the parties concerned belong to the Hindu caste of Chudasama Gameti Garasias, and it is common ground that the ordinary Hindu Law applies to this caste unless excluded by special custom. The appellants allege that by the custom of the caste daughters cannot inherit and adoption is forbidden. inability of daughters to inherit seems to have been established in the Courts below. Their Lordships have not to determine this matter and have not re-investigated it. The evidence adduced to show that adoption is forbidden by the custom of the caste consists entirely of what is said by a number of witnesses, who say that, if a man dies leaving a widow and no son, the widow cannot adopt a son and that no custom to adopt is recorded. But it appears that there are no written rules as to customs. Some instances to prove the statements made by the witnesses are adduced; but, as pointed out by the Subordinate Judge, they are all explicable on other grounds than the existence of the alleged custom. Moreover, one of the plaintiffs' principal witnesses (Vajesang) is discredited by his own inconsistent statements. Not one of the plaintiffs' witnesses goes so far as to say that he knows of any case or authority which shows that adoption is forbidden. On the other hand, the defendants adduce evidence showing that it is not forbidden, and they cite a case in point, viz., that of Ladhubha of Rojka. Their evidence is not very strong, and if the onus were on the defendants to prove a custom to adopt, their evidence might not suffice for the purpose.

Both the Subordinate Judge and the High Court have, however, properly held that it was for the plaintiffs to prove the custom on which they rely; and both Courts have come to the conclusion that the plaintiffs failed to prove it. Their Lordships, so far from differing from them, concur in their conclusion.

There remains the question whether, as Lalubha survived his father and lived to attain the age of fifteen or sixteen, the adoption was invalid. He died a minor and unmarried. Counsel for the appellants contended that Lalubha nevertheless ought to be held to have attained ceremonial competence, and that consequently the adoption was invalid. A great number of authorities bearing more or less on this subject were cited, but so far as they went they appear to their Lordships to be rather in favour of than against the validity of the adoption. Certainly no authority was cited which shows it to be invalid. Assuming that it would be invalid if it were shown that Lalubha had attained ceremonial competence, their Lordships are not in a position to decide whether he had or had not attained it. There does not appear to be any fixed age at which a Hindu child attains such competence. Nor is there any proof that Lalubha had attained such competence in fact, or that he ever acted or was treated as having attained it.

The Subordinate Judge, himself a learned Hindu, considered it to be clear that Lalubha had not attained such competence, as he died a minor and unmarried, and the High Court came to the same conclusion. Their Lordships are not prepared to say that he had attained such competence in the absence of evidence or authority to that effect. How the case, would have stood if it had been proved that Lalubha had attained ceremonial competence may be open to controversy, but their Lordships are not under the necessity of pursuing the inquiry.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed, and the appellants must pay the costs of the two respondents who appeared on the appeal.

Appeal dismissed.

Solicitors for the appellants—Messrs. Holman, Birdwood & Co. Solicitor for the respondents—Mr. R. A. Biale.

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APPELLATE CIVIL.

Before Mr. Justice Batty and Mr. Justice Starling.

1903. February 24. SAGUN BALKRISHNASHET KANEKAR AND ANOTHER (ORIGINAL DEFENDANTS 1 AND 2), APPELLANTS, v. KAJI HUSSEN VALAD KAJI ALI AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS 3—9), RESPONDENTS.*

Limitation Act (XV of 1877), schedule II, article 134—Trust property— Wakf—Land held on condition of service—Alienation—Limitation.

Where trust property is alienated by the trustees and the alienees have been in possession by purchase for more than twelve years, the suit as one for the purpose of restoring the property to the trust must fail as barred by article 134, schedule II of the Limitation Act (XV of 1877).

SECOND appeal from the decision of F. K. Boyd, Assistant Judge of Ratnágiri, reversing the decree of Ráo Sáheb Vishvanath V. Vagh, Subordinate Judge of Málvan.

Suit for possession and management of certain lands alleged to have been granted in wakf.

The suit was filed on the 10th January, 1896.

The plaintiffs were the sons of defendant 3 and the cousins of defendants 4 and 5. The lands in question had formerly been in the possession of defendants 3, 4 and 5, but had been alienated by them to defendants 1 and 2, who now held them.

The plaintiffs alleged that these lands were a portion of certain lands which had been granted in inim to the Kazi family, to which they and defendants 3, 4 and 5 belonged, for the purpose of defraying the expenses connected with the service of a certain mosque. A moiety of the lands so granted was now in the possession of one Kazi Abdul Razak, who was not a party to the suit, and the other moiety had belonged to defendants 3, 4 and 5, who performed service at the mosque. These defendants, however, in 1891 had ceased to perform their services, and the plaintiffs consequently had been performing them. The plaintiffs further alleged that defendants 3, 4 and 5 had in the year 1863 mortgaged their moiety of the said inim lands to the defendants 1 and 2 and that the share therein of defendant 3 (the father of the plaintiffs) had been subsequently sold and purchased by the

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said mortgagees (defendants 1 and 2). The final alienation was in the year 1875. The plaintiffs contended that these lands had been improperly alienated and that they were entitled to recover them on the ground that they were performing the services at the mosque for the purpose of which these lands had been granted.

Out of the seven defendants, the suit was contested only by defendants 1 and 2. They alleged that the lands had been the private property of defendants 3, 4 and 5, who had mortgaged and sold them. They further denied that the plaintiffs had a right to sue in the life-time of their father (defendant 3) and contended that the claim was time-barred, the alienations in their favour being more than twelve years prior to the institution of the suit.

The Court of first instance dismissed the suit on the ground that the plaintiffs' father was still alive and had not transferred his rights to them and that therefore they could not sue.

On appeal the Court confirmed the decree, holding that the suit was not properly framed and that the proper course to follow was to have the defendants 3, 4 and 5 removed from being trustees of the mosque.

Against this decision the plaintiffs having preferred a second appeal, the High Court (Parsons and Ranade, JJ.) held that the suit was maintainable and, reversing the decrees of the lower Courts, sent back the case to the Court of first instance for trial on the merits in reference to the remarks in its judgment. (See I. L. R. 24 Bom. 170.)

On remand the first Court found that the property in suit was wakf, that its alienations were not legally valid, and that the suit was time-barred, the plaintiffs' possession being adverse for more than twelve years before the suit. That Court therefore dismissed the suit.

On appeal by the plaintiffs the Judge reversed the decree and allowed the claim holding (1) that the lands in suit were wakf; (2) that the alienations were valid as against plaintiffs so long only as the alienors held office for which the endowment was made; (3) that the plaintiffs were entitled to recover possession; and (4) that the suit was not time-barred.

SAGUN BAEKRISHNA v. KAJI HUSSEN. Paragraphs 4, 5, 7 and 8 of the Judge's judgment ran as follows:—

4. With regard to my finding on the second issue :- No alienation can in the beginning be of more than the right, title and interest of the alienor. What, then, was the right, title and interest of defendant 3 and Kaji Mohidin at the time of the alienations by them to defendants 1 and 2? They were undoubtedly in possession of the plaint lands. In what capacity were they in this possession? This raises to a certain extent, the difficulty of the whole case, which will, I think, be more appropriately dealt with in discussing my finding on the fourth issue. Under the firman it is clear that they were not absolute owners. Did they, then, hold as trustees? Here a distinction must be clearly made with regard to the firman. This document creates an endowment in wakf and thereunder there are two distinct classes of beneficiaries. The first consists of those deriving benefit from "the charitable or religious object" to which the endowment is conscerate, viz., the whole Mahomedan community. The second consists of those who are or may become entitled to the emoluments of the office of peshnimaz. In what relation did the alienors stand towards these two distinct classes? My view is that they may be considered to stand in the light of trustees towards the former class, but not towards the second; and it is to this class that plaintiffs belong and in this capacity that they now No possible definition of trustee will include one who holds in his own right and derives no right whatever from the cestui qui trust. In Barney v. Barney [(1892) 2 Ch. 265)] it is laid down that "a trustee properly so called must have property committed to his charge." The person who so commits, or on whose behalf such commission is made, must of course be certui qui trust. Plaintiffs, in the character in which they sue, cannot in any way be described as cestuis qui trustent. It is, therefore, clear that defer dant 3 and Kaji Mohidin were never trustees as regards plaintiffs. ss I shall point out later, there are many rulings with regard to the alienation of life-interest in cases very similar to the present, and the only possible way to reconcile these with the clear language of section 10, Limitation Act, is to hold that such alienors are not trustees in the absolute sense of the term. There remains only one other possible capacity in which the alienors can have held, viz., that of persons holding in their own right, but not absolutely. And this, wi h regard to the descendan's of the original grantee, is the exact effect of the firman. With regard to these the firman creates what I cannot distinguish from an ordinary service inam.

5. The next question is whether the alieners held a life-interest, or a limited interest, viz., only during tenure or office. Such interests are distinguished in Venkatesh v. Timmappe (P. J. 189), page 146). Now the firman clearly lays down that the profits of the lands are for emolument of the office of peshaimas, and this is an office which still exists and the work of which is carried on by plaintiffs. I therefore think that the tenure of office, and not the life-time of any holder, is to be considered in determining the extent of his title. The intention of the wakf must be considered. The ruling of this High

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Court in Lotlikar v. Wagle (I. L. R. 6 Bom. 596) here demands attention: "Lind, which is the property of a temple, cannot be sold away from the temple. But what was sold in this case was the right, title and interest of one Bacha, a servant of the temple, who held the land in dispute as remuneration for his service. I think that (a) in the absence of any statute to the contrary, such interest as the holder of service land has in the land may be alienated; subject, of course, in the hands of the alience, to the (b) determination of such interest by the death of the original holder, or by his removal from his office on account of his failure to perform the service for which the land was held." This is a case very much on all fours with the present case. In the matter of (a), no doubt, under strict Mahomedan Law, wakf property is absolutely inalienable in the same way as in strict Hindu Law, service inam or watan, whether devasthan or otherwise, is alienable (Amir Ali, p. 383); but there are many ruilings against this view. An obiter dictum by Farran, J., in Amrutlal v. Sheik Hussein (I. 1. R. 11 Bom. 50) expresses the principle adopted. Referring to wakf, I instance Bibee Kuncez v. Bibee Saheba Jan (8 W. R. 313; also Futtoo Bibee v. Bhurrut Lall (10 W. R. 299) quoted by Ranade, J., in his judgment on the first stage of the present case. Upon the general analogy between the present form of wakf and service inam or watan there are many rulings applicable, e.g., Jamal Saheb v. Murgaya Swami (I. L. R. 10 Bom. 34); Trimbak Bawa v. Narayan Bawa (I. L. R. 7 Bom. 188) and others. With regard to (b), as I have said above, the firman does not create life-interests. And I find that resignation or removal would have the same effect. In this I am supported by Parsons, J., who says: "..... upon whom (viz., plaintiffs) on the death of the present mutawallis, the office of mutawalli would fall by descent, if indeed it has not already fallen by abandonment and resignation"; and by Ranade, J., who has remarked: "the relief about possession might also be claimed under certain circumstances, if it is proved that they (viz., plaintiffs; have succeeded to the office of mutawalli." And, as I have pointed out, this latter fact is not disputed. These, then, are my reasons for my finding on the second issue.

7. My finding on the fourth issue presents some points of interest. In my view of the ease, article 140, Limitation Act, is decisive. This lays down that in a suit by a remainderman, a reversioner (other than a landlord), or a devisee for possession of immoveable property, the time limit is twelve years from the date when his estate falls into possession. That is to say that, in the present case, the time-bar dates from the new title (viz., 1891) and not from the alienations of 1863 and 1873 or 1875. The date of suit being 10th January, 1896, there is no question of limitation.

8. Upon this last issue the arguments of the learned vakils on either side were mainly directed. The entire case for defendants turns upon the applicability or otherwise of section 10, Limitation Act. That section is as follows:—"Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such preperty,

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shall be barred by any length of time." The aliences (defendants 1 and 2) are admittedly assigns for valuable consideration, although their title in part is that of mortgagee, vide Yesu Ramji Kalnathv. Balkrishna Lakshman (1. L. R. 15 Bom. 583). If, then, the alienors "were persons in whom property had become vested in trust," the section will apply and the time-bar will be twelve years from the alienation, as laid down in article 134. Upon this hypothesis many rulings were quoted, e.g., Chintamoni Marapatro v. Sarup (I. L. R. 15 Cal. 703); Nilmony Singh v. Jagabandhu Roy (I. L. R. 23 Cal. 536); Kannan v. Nilkandan I. L. R. 17 Mad. 337); and most important of all, Behari Lal v. Muhammad Muttaki (I. L. R. 20 All. 482). Upon this point I take the last as typical and embodying the principle running through all. In this case a son sued to recover possession against certain alienees on the ground that the alienations were in violation of the trust, and it was held by the Full Bench that limitation commenced to run against the trustee from the date of the aliences obtaining possession. The mortgages here were for valuable consideration, and the ruling does not more than follow section 10, Limitation Act. But I find the hypothesis on which these rulings were quoted entirely unsound. The learned vakil for plaintiffs did not approach this point; but, to my mind, it is that upon which the entire case turns. For the reasons I have given in paragraph 4 of this judgment, I cannot nold that the alienors can in any way be regarded as trustees so far as regards plaintiffs. I hold, therefore, that none of these rulings are applicable and that nothing in section 10 can support defendants. It follows from my view in the matter of trust that if plaintiffs had sued as members of the Mahomedan community, they would have been time-barred; but that is not the character they bear in the present suit.

Defendants 1 and 2 preferred a second appeal.

Inversity (with Chimanalal H. Setalvad and H. C. Coyaji) for the appellants (defendants 1 and 2):—The principal point is one of limitation. The plaintiffs are members of the Kazi family. In this case only a half share of wakf property was given to the Kazi family and the dispute relates to that half share. It was mortgaged by defendant 3, the father of the present plaintiffs, and his brother Mohidin, to an ancestor of defendants 1 and 2 in 1863. Subsequently both of them passed separate mortgages of their shares in 1873. Afterwards in 1875 Balkrishna, father of defendant 1, bought defendant 3's share at a Court-sale. It is admitted that defendants 1 and 2 have been in possession of the half share since 1863. They are in possession now partially as mortgagees and partially as owners. Though the property in suit is found to be the property of the mosque, still we contend that the present suit for recovery of possession is time-barred by our

adverse possession for more than twelve years. The Judge has not correctly grasped the effect of the judgment of the High Court remanding the case for trial on the merits. The High Court held that the suit was maintainable only for the purpose of having the lands restored to the trust and that the plaintiffs can get possession as trustees if they succeed in recovering the lands for the trust.

We do not admit that the plaintiffs ever succeeded to the office of mutawalli If the property is trust property, still the claim would be time-barred under article 134, schedule II, of the Limitation Act. There is no such thing as succession of life estates in Mahomedan Law: Abdul Gafur v. Nizamudin 1), Ismail Mahomed v. Hurbais (2)

It is not alleged that the grant is to the Kazi family. The plaintiffs sue as trustees for the masjid and the claim is time-barred: Dattagiri v. Dattatraya (3); The President, &c., of the College of St. Mary Magdalen v. Attorney General (4); Gnanasambanda v. Velu Pandaram (5); Behari Lal v. Muhammad Muttaki. 6)

Raikes (with R. R. Desai) for respondents 1—4 (plaintiffs):—
The main question is whether the alienors were trustees and whether they had the legal ownership. If they were trustees, then we contend that our cause of action arose when we entered on the office in 1801. The alienors, if they were trustees, had to perform certain services and to light up the mosque, and in consideration of the services they were to take the income of the lands. The only way the lands could be available for services and lighting was by turning their income into money. The trustees could do that by leasing the lands or by grant for life on yearly payment. The plaintiffs are therefore entitled to possession because the alienors have ceased to render service and the plaintiffs have been rendering it since 1891. The view taken by the High Court when it remanded the case is consistent with our present contention.

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^{(1) (1892) 19} I. A. 178; 17 Bom. 1.

^{(2) (1898)} P. J. p. 107.

^{(3) (1902) 4} Bom. L. R. 743; see anto

^{(4) (1857) 6} H. L. Cases 189.

^{(5) (1899) 27} I. A. 69; 23 Mad. 271.

^{(6) (1898) 20} All. 482.

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We do not admit that the alienors were trustees, but supposing that they were, still their alienations would be good during the time they remained in office. If the alienations were within the powers of the alienors, they would be effectual only during their life-time or till their resignation or removal from office. Our right to the lands accrued to us in 1891 when the office-holders ceased to render service. We do not claim through the alienors, but we claim per formam doni: Amrutlal v. Shaik Hussein (1); Trimbak Bawa v. Narayan Bawa (2); Lotlikar v. Wagle (3); Venkatesh v. Timmappa (4); Jamal Saheb v. Murgaya (5); Jewan Doss v. Shah Kubeer-ood-deen (6); Piran v. Abdool Karim. (7)

Situram S. Patkar for respondent 7 (defendant 5).

Setalvad in reply.

BATTY, J.:—In this case the plaint as described by the Court of first instance alleged that certain land therein referred to was the service inam property of a mosque; that the rights of service and of managing the estate belonged to the family of the plaintiffs and of defendant 3 their father, and of defendants 4 and 5; that the defendants 3, 4 and 5 had ceased to perform service, and that the plaintiffs had rendered the service in their stead and that the defendants 1 and 2 had enjoyed, through the defendants 3, 4 and 5, a part of the profits of the share to which the plaintiffs were entitled.

The defendants 3, 4 and 5, members of the plaintiffs' family, did not contest the claim.

The defendants 1 and 2, who are Hindus, admittedly have been in possession of the land in suit since 1863 under mortgages both from defendant 3, the father of plaintiff, and from the father of defendants 4 and 5 and from defendants 4 and 5 themselves, and in 1875 purchased at a Court-sale the equity of redemption of defendant 3.

The plaintiffs' suit was rejected by the Court of first instance and the lower Appellate Court on the ground that, the plaintiffs'

^{(1) (1887) 11} Bom. 492, 505.

⁽⁴⁾ P. J. 1897, p. 146.

^{(2) (1882) 7} Bom. 188.

^{(5) (1885) 10} Bom. 34

^{(3) (1882) 6} Bom. 596.

^{(6) (1840) 2} Moore's I. A. 390,

^{(7) (1891) 19} Cal. 203, 218.

father being still alive, the plaintiffs could not claim present possession and had not shown that they have a right to the office to which the property in suit belongs.

In the grounds of second appeal the plaintiffs alleged, interalia, that the lower Appellate Court had erred in holding (1) that under the Mahomedan Law the whole of the property in suit was not endowment property; (2) that having found that part of the property was endowment property it erred in rejecting the whole of the plaintiffs' claim; (3) that it erred in holding that part of the property was the private property of the defendants 3, 4 and 5. They also alleged (4th para. of the memorandum of appeal) that the lower Court ought to have held the alienations alleged by the defendants 1 and 2 were under the Mahomedan Law void: and (para. 10) that the lower Appellate Court erred in holding that the plaint was not properly framed to entitle the plaintiffs to obtain relief, and that if there was any formal defect the plaintiffs should be allowed to amend their plaint.

The above being the position taken up by the plaintiffs, the decrees of the lower Courts were reversed on second appeal, the judgments in which by Parsons, J., and Ranade, J., are reported at I. L. R. 24 Bom. 170. Parsons, J., held that the suit would be maintainable if regarded as one to recover trust property improperly alienated from the trust, and that as beneficiaries entitled in pursuance of the trust the plaintiffs could sue to have the alienations set aside and the property restored to the trust, though if they desired to obtain possession themselves, they must show that they are also holder of the office of mutawalli. It is clear that Parsons, J., regarded the suit as maintainable on this ground alone.

The judgment of Ranade, J., explicitly stated that if the suit is treated as one for the possession of the land it is defective and not properly maintainable in its present form, and proceeded to observe that as the lower Appellate Court had found that the lands are only partly endowed property, and the Kazi defendants 3, 4 and 5 have also beneficial interest therein, alienation to the extent of this beneficial interest might be permissible, but that it was obvious that the suit considered in this light was

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Sagun Balkrishna v. Raji Hussen. improperly framed and defective in its character of which para. 10 of the memorandum of appeal showed the appellants themselves to be conscious. It was solely on the ground that the principal object of the plaint was to secure a declaration that the lands were the inam property of the mosque, and as such not liable to alienation, that the suit was allowed to proceed: for it was stated if that declaration could be claimed by appellants, their inability to seek the other reliefs claimed would not defeat the main object of the suit.

The lower Appellate Court appears to have held that the property in dispute was not trust property in the hands of the alienors, but was practically a wage fund to which, as persons performing the required services, the alienors were entitled during their tenure of office, and which to the extent of that limited title they could therefore alienate without committing any breach of trust and without affecting anything beyond their interests in the remuneration provided for such services. on this ground the lower Appellate Court appears to have held that article 134 would be inapplicable to the suit, as the property had not been purchased from the alienors, defendants 3 to 5, as trustees, but merely as servants alienating by anticipation the wages provided for their service. This is the only meaning that I can attach to paras. 4 and 5 of the very elaborate and ingenious judgment of the lower Appellate Court. For the case of Lotlikar v. Wagle (1) is cited by the lower Appellate Court as on all fours with the present case. That was a case in which the assignee of land devoted to the remuneration of service, had alienated the interest assigned to him as such remuneration, and it was held that when his service had determined, the interest of the alience would else determine—but not before—that is to say, it might last possibly as long as the alienor lived or possibly only till he was ejected by the trustees.

Now no doubt a servant may dispose of his wages without effecting any alienation of any trust property from which those wages are payable. And this is referred to by Ranade, J., in his remark that to the extent of such beneficial interest, alienation might be permissible. But then, that remark is immediately

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followed by the statement that if this suit be considered in this light it is obvious that it was improperly framed and defective in its character. The order of remand, therefore, did not authorise the trial of the suit as viewed in this light, but declared it for such purposes imperfectly framed and defective in character. And by that decision we are bound.

From the judgment of Ranade, J., it may be gathered that the grounds on which the lower Court proceeded were at least in some measure approved, so far as concerned the rejection of the suit considered as one to recover the land as in any sense private property. Thus if treated as a suit to recover a portion of a private estate, partition would be necessary and non-joinder of coparceners would be fatal. But the lower Appellate Court having found that the land was partly endowment property, that is at least in part subject to a trust, an equally fatal objection was recognised as arising from the form of the suit, which is manifestly distinguishable from the case of Lotlikar v. Wagle for the judgment in that case speaks of the alienor as assignee of the land as remuneration from the temple authorities for his services. In the present case, on the other hand, it is not alleged that the land in suit has been assigned to the remuneration of the plaintiff or even that it had been assigned specifically as the remuneration of services to be performed by defendants 3, 4 and 5. And as this was left indefinite and as the share alienated by them was only a portion of that which was available as remuneration, it was clearly impossible to treat the suit as one merely for the recovery of a specific wage fund, set apart for the remuneration of the plaintiffs. For there is no allegation in the plaint that the land had been assigned to the plaintiffs by the mutawalli. If the defendants 3 to 5 held the land, and alienated the land, not as trustees or mutawallis but merely as servants to whom it had been assigned as remuneration for services exigible from them, the plaintiffs, it would seem, could not claim that land as remuneration until the tenure of defendants 3 to 5 as such servants had determined. All the plaintiffs could claim would be to have the land restored to the trust. This seems to have been the view of the ease taken by Parsons, J., and Ranade, J., in the judgment in Kazi Hassan v.

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Sagun Balkrishna, (1) The claim was susceptible of three alternative constructions. Either the land was to be regarded as entirely private property, in which case partition with the joinder of all the parties would be necessary, or secondly if all of it were impressed with a trust, the suit could only be one for its restoration to the trust and to set aside an alienation by the defendants as trustees. Thirdly, if it were partly subject to trust and partly held for mere service, not only would it be necessary to allege specific assignment for service, but the determination of the assignment under which the defendants 3 to 5 had held, and a re-assignment to the plaintiffs. The only alternative in which the suit as brought would be maintainable was therefore that the land had been alienated by the trustees and not by the servants. And if that alienation by the trustees had continued for more than twelve years, there could be no doubt, as the lower Appellate Court recognised, that the suit would The question whether the plaintiffs were be time-barred. mutawallis was thus immaterial. Their contention in their grounds of appeal was, as shown above, that the whole was endowment property; that no part was the private property of the defendants 3 to 5; and that the alienation by them was void. And thus they claimed not that the defendants 3 to 5 had alienated their own rights to the remuneration for service which had determined, but that the endowment property itself had been illegally alienated, as indeed the transaction impugned purports to have alienated it. In such case whether the plaintiffs claim as beneficiaries or as mutawallis their suit brought more than twelve years after the alienation is beyond time. The case of Jewan Doss Sahoo v. Shah Kubeer-ood-deen (2), which is the only one of those cited by respondents in any way appearing to support their contention to the contrary, appears to have been decided with reference to the regulations therein referred to, viz., Regulations III of 1810 and II of 1805 (vide page 423), and the mutawalli in that case was accordingly regarded as the authorised agent of Government appointed for the performance of the acknowledged duty to Government for the protection of the endowment and had, as indicated in the judgment, to collect revenue on behalf of Government. It is unnecessary here to consider whether

(2) (1840) 2 Mocre's 1, A, 390.

(1) (1899) 24 Bom. 170; I Bom. L. R. 649.

the right of the Secretary of State would be barred under article 149 or otherwise. As against the plaintiff or any private individual, article 134 would be a bar to recovery of possession of the property purchased. The plaintiff does not ask to redeem. Plaintiff impeaches the mortgage as well as the sale as wholly void. The case of Venkatesh Prabhu v. Timmappa (1) has therefore no application. The rulings cited by the lower Appellate Court of Chintamoni Mahanatro v. Sarun (2); Nilmony Singh v. Jagabandhu Roy (3); Kannan v. Nilkandan (4) and Behari Lal v. Muhammad Muttaki (5) establish, as that Court fully recognised. that if the alienations were in violation of the trust, limitation would run against the trustees from the date of the aliences obtaining possession. To these may be added Gnanasambanda v. Velu Pandaram (6) and the case there cited of Juttendro Mohun Tagore v. Ganendro Mohun Tagore (7), the recent case of Dattagiri v. Dattatraya (8) and cases there cited and the case of President, &c., of Magdalen Hospital v. Knotts. (9) The lower Appellate Court appears to have realised that these cases would be absolutely conclusive, but that they were quoted on the unsound hypothesis that the alienors in this case were trustees. But it appears also that the plaintiffs' vakil did not raise this point and that the hypothesis was impugned not by the learned vakil for the plaintiffs, but by the lower Appellate Court suo motic. It is, I think, always a matter for regret that a Court should select for the ground of its decision a point that has not been approached by the vakil or the counsel of the party in whose favour it is supposed to tell. For while the other side must be taken by surprise if a point not urged against him is made the ground of decision, the party in whose favour it is decided may be deprived of the benefit which he might have derived from a consideration of such arguments as he may have advanced. It appears from the lower Appellate Court's judgment in this case that the plaintiffs' vakil did not rely upon the point on which the lower Appellate Court considered the entire case turned. viz., that the alienors disposed of the property in question

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^{(1) (1897)} P. J. 146.

^{(2) (1883) 15} Cal. 703.

^{(3) (1896) 23} Cal. 536.

^{(4) (1884) 7} Mad. 337.

^{(5) (1898) 20} All, 482.

^{(6) (1899) 23} Mad, 271; 27 I. A. 69.

^{(7) (1872)} L. R. I. A. Sup. Vol. 47; s. c. 9. Beng. L. R. 377.

^{(8) (1902)} ante p. 362.

^{(9) (1879) 4} Ap. Cas. 324.

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not as trustees, but as owners of the property alienated by them. If the plaintiffs had contended that the property had been alienated as their share of the remuneration for services exigible, they would have had to show not merely that they had performed those services, which it is conceivable they might have performed at the desire and on the behalf of defendants 3, 4 and 5 from whom they were exigible, but that on their undertaking the performance of those services, the land in suit could not be withheld from them as the earnings of defendants 3, 4 and 5. But the lower Courts have not decided that point and have apparently never been asked to decide it, and there is consequently no finding that the plaintiffs individually have a better right to the land or its proceeds or to any particular part of it than the defendants 3, 4 and 5 or their assignees the defendants 1 and 2. The lower Appellate Court has found that the plaintiffs have succeeded to the office of mutawalli. that finding would no doubt have entitled them to urge a claim, if not time-barred, to rights vested in the mutawalli, that is to say, to the property in suit as trust property. But as the lower Appellate Court has found the property is not trust property at all, but only the earnings of defendants 3 to 5, entitled as servants and not as mutawallis, the plaintiffs could not succeed without proving that the right of those defendants to the property so viewed has determined. And though their right to the office of mutawalli may have fallen by abandonment, and resignation, if the property was not vested in them as mutawallis in trust but, as the lower Appellate Court held, as persons holding in their own right absolutely, their vacation of the office of mutawalli would not show that such absolute right had ceased to exist and had been transferred to the plaintiffs. The lower Appellate Court appears to have held that the land was held as inám for services, and refers to a sanad of 1895 as showing that it has always been so regarded. Apart from the question whether a sanad granted in 1895, apparently just before suit. could retroact on transactions effected in 1863 and 1875, or change the title of the alienors in the past, it is difficult to see how the plaintiffs could claim the restoration of the land as inám before the particular estate assumed to vest in successive

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life-holders had determined. It is not and cannot be contended that the office of peshnimaz falls within the definition of a hereditary office under Bombay Act III of 1874, which relates to offices for the performance of duties connected with matters of civil administration. The question whether if held free from the trust as service inam the land tenure was one of successive life estates is one which it is not necessary in this appeal to determine or to consider. No authority has been cited to show that if the land is held free from a trust on condition of service, and as such alienated by the holders for the time being, other members of the family merely because they were suffered to perform the service in lieu of the alienors, would have the right to recover from the alienees. The only ground on which the plaintiffs could have succeeded in the suit as framed was, as already pointed out, that the property was trust property improperly alienated by the trustees, and liable as such to be restored to the trust. And the lower Appellate Court having found that the alienees have been in possession by purchase for far more than twelve years, the suit as one for the purpose of restoring the property to the trust, must necessarily fail as barred by article 134 of the Limitation Act. I therefore think that the decree of the lower Appellate Court must be reversed and the suit must be dismissed with costs. By consent of the parties the judgment of my learned colleague has been delivered by me on his behalf, he having vacated his seat on the Bench shortly after the hearing of the appeal and before this judgment was ripe for delivery.

STARLING, J.:—About 50 years ago a certain thikan was held, as to one moiety by one Kaji Abdul Rajak and as to the other by one Kaji Ali and one Kaji Mohidin. This thikan seems to have consisted of three pieces of land which had apparently been granted in 1641 and confirmed by a firman registered in 1834 to the ancestors of the abovenamed three persons. One of the pieces of land in respect of a moiety of which this suit is brought was described in the firman as being set apart for the lighting of a mosque to which another of the pieces of land was also dedicated. It is to my mind clear that as to the piece of land now in dispute the grantees were trustees to receive

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the income of the land and to apply it in or towards the lighting of the mosque, and the fact that after providing sufficiently for the carrying out of that purpose there might be a surplus left which the grantees, not unlawfully, might apply to their own use for services rendered by them in that behalf does not make them any the less trustees. It was argued that although they might be trustees yet the interest of each successive generation was only a life-interest. A life estate, however, is unknown to Mahomedan Law. The Hedaya lays down in Volume III, Book xxx, Chap. 2, page 489 of Grady's Edition, that an amree or life grant "is nothing but a gift and a condition; and the condition is invalid; but a gift is not rendered void by involving an invalid condition"; consequently the donee, with a life condition added to the gift, becomes the absolute owner. This principle is recognized by the Privy Council as law in Mussamut Humeeda v. Mussamut Budlun (1), which was followed in Abdul Gafur v. Nizamudin (2) affirming the decision in Nizamudin v. Abdul Gafur). Therefore the grantees did not hold the property by a series of life estates. In fact, the firman itself seems to treat them as the owners of the land and, except as to the office of peshnimaz which was provided for by a separate royal grant, not as mere mukhtyars managing the property on behalf of the grantor according to the terms imposed by him. This distinguishes it from the case of Jewun Doss v. Shah Kubeer-ood-deen (4), the firman in which case, to be found at page 419, distinctly showing that the grantee was only to be in occupation of the lands granted in order to apply their produce as directed therein, in fact, that he was not the owner of the lands, and had not the legal estate in himself, but was merely a mukhtyar, and that in the event of his heirs being in possession of the lands under the firman, they would be in possession merely as mukhtyars for the time being. In the present case there is a grant of three pieces of land to the grantee as inamdar, and to my mind as full owner of the legal estate, one piece being described for the mosque, another for the lighting of the mosque. and the third being unfettered by any trust or condition.

^{(1) (1872) 17} Cal. W. R. 525.

^{(3) (1888, 13} Bom. 264.

^{(2) (1892)} L. R. 19 I. A., p. 178; 17 Bom. I. (4) (1849) 2 Moore's I. A. 393.

Consequently I am of opinion that this is not a wakf strictly so called with the quality of absolute inalienability attached to the lands, but that the grantees were in the position of ordinary trustees. If the grantees be ordinary trustees, then article 134 of Act XV of 1877 applies, and as the defendants have been in possession under their mortgage more than twelve years, the plaintiffs' suit would be barred. The respondents-plaintiffs relied upon the case of Trimbak v. Narayan (1) which was, however, disapproved of in Gnanasambanda v. Velu Pandara 16 (2), and I do not therefore consider that it affords any guide to the Court in the present case. There is, however, a recent case of Dattagiri v. Dattatraya (3), which seems to me to be on all fours with this case, and, after taking into consideration all the authorities and arguments brought to the notice of the Court, I am of opinion that the plaintiffs' suit is barred and the decree of the lower Court must be reversed with costs and the decree of the Subordinate Judge restored.

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Decree reversed.

(2) (1899) L. R. 27 I. A. at p. 78. (1) (1882) 7 Bom. 188. (3) (1902) 4 Bom. L. R. 743, ante p. 363.

APPELLATE CIVIL.

Before Mr. Justice Batty and Mr. Justice Starling.

THAKORE FATESINGJI DIPSANGJI (OBIGINAL PLAINTIFF), APPELLANT, 9. BAMANJI ARDESHIR DALAL (ORIGINAL DEFENDANT), RESPONDENT.*

1903. February 26.

Landlord and tenant-Permanent tenancy-Void lease-Lessee's adverse possession-Disclaimer of landlord's title to evict-Estoppel-Unregistered lease-Admissibility in evidence-Ratification-Acquiescence-Submission -Limitation Act (XV of 1877), schedule II, articles 120, 139 and 144-Evidence Act (I of 1872), sections 115 and 116—Registration Act (III of 1877), section 49-Panch Mahals.

One Dipsangji, the Thakore of Kanjeri in the Panch Mahals, died on the 7th August, 1877, leaving him surviving the plaintiff Fatesingji, who was born on the 8th December, 1874. The Panch Mahals had been ceded by Scindia to the British Government in 1861, but by Act XV of 1874, Act XX of 1864,

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the Bombay Minors' Act, had been declared not to be applicable to that district. Act XV of 1874 came into force on the 8th December, 1874. On the 29th August, 1877, the Government of Bombay sanctioned the attachment of all the property of the plaintiff's deceased father and appointed Mr. Wilson, the Extra Assistant Collector of the Panch Mahals, to manage the estate during the minority of the heir, and from that time the plaintiff's estate was under the management of the Collector for the time being of the Panch Mahals, Before 188! the defendant had been applying for a lease to him of certain waste lands in the plain iff's estate, and in June and December, 1881, and February, 1884, three leases (Exhibits 59, 60 and 61) were granted to the defendant of portions of such land by the Collector purporting to act on behalf of Government, but no specific sanction of Government was obtained to the leases. These three leases were not registered. The Bombay Minors' Act came into force in the Panch Mahals in 1885, and in 1886 the Collector obtained a certificate of administration to the plaintiff's property under that Act. The plaintiff came of age on the 8th December, 1895, but the administrator did not hand over his property to him on that day. On the contrary the then Collector, by his own order dated the 20th November, 1895 (Exhibit 142), and without the sanction of any superior authority, directed that the attachment of the estate was not to be removed for the present, and in fact it continued until the plaintiff received charge of his property on the 16th January, 1897. In the meantime, viz., on 30th May, 1896, the Collector executed a consolidated lease of the lands comprised in Exhibits 59, 60 and 61 to the defendant without any sanction from the Government or the District Court by which he had in the first instance been granted a certificate of administration (Exhibit #2). This lease was duly registered. In January, 1900, the plaintoff informally required the defendant to give up possession of the lands he was then in possession of (Exhibit 140), and on the 13.h January the defendant claimed to hold the lands under Exhibit 62, and on the 15th January, 1900, the plaintiff brought the present suit to have it declared that the defendant was only a cultivator and to be put in possession of the lands. In his written statement the defendant rested his cisim on the lease, Exhibit 62. Subsequently, however, in case that might be held to be inoperative he fell back upon the leases (Exhibits 59, 60 and 61).

Held, (1) that the mere fac that the plaintiff had received through his talati two instalments of rent did not amount to a ratification of the lease of the 30th May, 1896 (Exhibit 62), though it might have been effectual as an acknowledgment of a yearly tenancy.

It was contended that the action of the Collector was ratified by Government by their Resolution No. 5008 (Exhibit 100), which however was subsequent to the appointment of the Collector under Act XX of 1864, whereby the guardianship of Government had determined.

Held, (per Batty, J.), that there can be no ratification by a person who at the time of ratification could not have done the act himself even though he had the power to do it when the original act unauthorised by him was done.

The defendant contended that he had been in possession as of right and that his possession was therefore adverse and had continued for over twelve years. That the defendant became a permanent tenant under the plaintiff's guardian, the Collector; that the plaintiff had not repudiated the act of his guardian within three years after he attained majority and consequently that in any view of the case his laim was time-barred.

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H-ld: It is well established that there can be adverse possession of a limited interest in property as well as of the full title as owner. As it appeared that the defendant agreed to go into possession under rules which would give him a permanent tenancy and that he had ever since he went into possession claimed to be in a a permanent tenant, he had therefore since 1831 and 1884 been in adverse possession as a permanent tenant.

Held, further, that as the plaintiff had not brought the suit within three years of attaining his majority, the defendant had obtained by adverse possession a right to hold the lands as against the plaintiff as a permanent tenant.

Per Batty, J.—The authorities show that a tenant in India is not procluded by an admission of tenancy from showing that the nature of the tenancy asserted by him to the knowledge of the landlord has been for the period prescribed by the Limitation Act pro tanto adverse to the right to evict either at will or on notice given.

A manifest assertion by the tenant to the knowledge of the person representing the landlord's interests of a right inconsistent with that claimed by the landlord to treat him as a tenant-at-will or from year to year would be a disclaimer of the landlord's title: Vivian v. Moat (1) relied on.

A landlord merely by receiving rent cannot preserve his right to other claims continuously denied by the tenant.

The fact that such assertion and enjoyment are not challenged does not change their adverse character when once the necessity for challenging it has arisen.

It was contended that the unregistered leases even though they required registration could still be looked to for the purpose of ascertaining what was in the contemplation of the parties.

Held, (per Batty, J.): "A document inadmissible under section 49" (of the Registration Act) "could not, I think, be used as evidence of delivery of possession. But seeing that the Legislature has advisedly rejected in the more recent Act the phrases which made such unregistered documents absolutely incapable of being received in evidence at all and has very guardedly stated the purposes for which they shall not be received, I think, in the absence of authority to the contrary an unregistered document inadmissible for the purpose of affecting immoveable property or of any transaction affecting immoveable property may yet be looked to, not in any way as creating a title, or as showing a transaction that affected the property, but merely as containing

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First appeal from the decision of Ráo Bahádur Chunilal Mathuradas, First Class Subordinate Judge of Ahmedabad, in original Suit No. 43 of 1900.

Suit for a declaration that the defendant was a yearly tenant and for recovery of possession of lands.

The plaintiff's father Dipsangji was the Thakore of several villages in the zilla of the Panch Mahals in the Ahmedabad District. The Panch Mahals were originally the territory of the Scindia, who transferred them to the British Government in the year 1861. Under the Scheduled Districts Act. XIV of 1874, they were treated as a Scheduled (Non-Regulation) District and continued as such till 1885. Dipsangii died on the 7th August, 1877, leaving him surviving the minor plaintiff, who was born on the 8th December, 1874. At the time of Dipsangji's death the annual income of his estate was Rs. 13,000 and his liabilities amounted to Rs. 25,000. The matter was reported to Government and the Government of Bombay on the 29th August, 1877, issued a resolution directing that the estate of the deceased Thakore should be attached and managed by the Collector of the Panch Mahals through one of his assistants; that the then Assistant Collector, Mr. Wilson. should take early steps for obtaining a correct account of the. Thákor's debt, and that Government, on being informed of their exact amount, would determine the best plan for effecting their liquidation. The estate was accordingly placed under attachment and was put under the management of an Extra Assistant Collector. In the year 1881 Mr. W. Woodward, who was then the Acting Collector of the Panch Mahals, purporting to act for Government, granted to the defendant 435 acres and 29 gunthás and 413 acres and 5 gunthas of waste land, subject to the conditions of the Waste Land Rules, under two permanent unregistered leases dated the 29th June, 1881, and 21st November following (Exhibits 59 and 60). A similar grant of 1,134 acres and 18 gunthas (Exhibit 61) was made to the defendant on the 26th February, 1884, by Mr. J. K. Spence, who was then the

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Collector of the Panch Mahals. All the three leases were unregistered and specific sanction of Government was not obtained for them. The Minors' Act, XX of 1864, came into force in the Panch Maháls in May, 1885, under the Panch Maháls' Laws Act, VII of 1885, when the Panch Maháls were changed from a Non-Regulation District to a Regulation District, and in 1886 the Collector obtained a certificate of administration of the minor plaintiff's estate under the Minors' Act. In the meanwhile some doubt as to the validity of the aforesaid three leases having arisen owing to the conversion of the Panch Maháls into a Regulation District, the then Acting Collector proposed to Government in the year 1890 that he should execute, with the requisite sanction of Government, a revised and consolidating lease for the purpose of securing the defendant's position. The Government thereupon on the 18th July, 1890, issued a Resolution, No. 5008, R. D. (which recited the Collector's proposal), to the local authorities for "information and guidance" without further expressing their own views. On the 30th May, 1896, Dr. J. Pollen, who was then the Collector of the Panch Mahals, purporting to act as the Administrator of the plaintiff's estate, passed to the defendant a registered consolidated lease (Exhibit 62) of the lands comprised in the three previous leases which were thereby cancelled. Though the plaintiff attained majority on the 8th December, 1895, the attachment on his estate continued till the 16th January, 1897, when he was put in charge of the estate. After the plaintiff received charge he wrote some letters requesting the Collector to furnish him with all the papers in connection with the grant to the defendant, and on the 23rd September, 1898, he was supplied with a copy of the consolidated registered lease dated the 30th May, 1896. The plaintiff received from the defendant rent for the years 1897-98 and 1898-99, and in or about the month of November, 1899, he sent his man to the defendant asking him to vacate the lands. The defendant thereupon informed the plaintiff that he held the lands as a permanent tenant under the leases granted by the Collectors. On the 11th January, 1900, the plaintiff gave the defendant notice of a suit owing to the defendant's failure to vacate the lands, and on the lath January the defendant

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answered relying on the leases. On the 15th June following the plaintiff filed the present suit impeaching the Collector's authority to create a permanent tenancy. He prayed for a declaration that the defendant held the lands in suit as his yearly tenant and for recovery of possession of those lands.

The defendant contended that the claim was time-barred; that the lands in question were let to him as a permanent tenant under the Government Waste Land Rules; that at the time of the death of plaintiff's father, the Panch Mahals were a Non-Regulation Province, so the Collector attached the plaintiff's property under the orders of Government and began to administer it as their agent; that the Panch Mahals became a Regulation District in 1885 and the Collector thereupon, in 1886, obtained a certificate to administer the plaintiff's estate under the Minors' Act (XX of 1864); that the lands were let out by the Collectors to him solely for the benefit of the plaintiff; that the Collector granted to him a consolidated lease on the 30th May, 1896; that he has been enjoying the lands as a permanent tenant since 1881 and 1884; that he paid rents according to the terms of the leases and the plaintiff and the Collectors accepted them; that the Collectors had authority to grant the lands to him permanently and the contract was binding on the plaintiff; that he expended in good faith Rs. 3,00,000 on the improvement of the lands; that the plaintiff could not recover possession of the lands without paying him their value; that the plaintiff having recovered rents for the years 1:97-98, 1898-99 according to the terms of the permanent lease, he was estopped from bringing the suit; that the plaintiff's allegation that he first came to know of the permanent tenancy in 1899 was not true and that the plaintiff was not entitled to evict him so long as he paid rents as a permanent tenant.

The Subordinate Judge found that the claim was not timebarred; that the plaintiff had not given a proper notice to quit, but the service of such notice was not necessary; that the lands in suit were let out to the defendant on permanent tenure; that the lands were first let out to him by the Collectors of the Panch Mahals as the sole managers of the estate appointed by Government and they were next let out to him by the Collector as

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plaintiff's certificated guardian; that the Collectors of the district as sole managers of the estate so appointed by Government had authority to grant the lands in such permanent tenure as they had given and the plaintiff having ratified the leases granted by the Collectors could not repudiate them; that the defendant had expended large sums in improving the lands and colonizing them and he was entitled to get back the costs of all necessary improvements if he was to be ejected from the lands, and that the plaintiff was not entitled to any relief. The Subordinate Judge, therefore, rejected the claim with all costs on plaintiff.

The plaintiff appealed.

Inverarity (with P. M. Mehta and Lallubhai A. Shah) appeared for the appellant (plaintiff):—The defendant claims to hold the lands under Exhibit 62, the consolidated registered lease of 1896. He also, in case that lease be held to be void, seeks to fall back upon the three prior leases of 1881 and 1884, which were unregistered. The first question is whether the prior leases being unregistered are admissible in evidence. We contend that they are not, inasmuch as they purported to create an interest in immoveable property to the extent of more than one hundred rupees, see section 17 of the Registration Act (III of 1877). The Panch Maháls, which were originally the territory of the Scindia, were ceded by him to British Government in 1861. Therefore at the time of those leases the Panch Maháls were included in British India, and consequently the leases were governed by the Registration Act which applies to the whole of British India.

If the leases did not require registration, then the next question would be whether the Collectors had authority to grant them. The Minors' Act XX of 1864 was not then applicable to the Panch Maháls which became a Regulation District under Act VII of 1885 and the Minors' Act was introduced in the Panch Maháls in May, 1885. The Collector took a certificate of administration in 1886; the leases of 1831 and 1884 were therefore unauthorised and further they had not been sanctioned by Government. The very fact that the Collector subsequently asked for the sanction of Government for the lease of 1836 shows that the previous leases were not authorised. The defendant, therefore, cannot rely on those leases in support of his rights.

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As regards the consolidated lease of 1896 the Collector had, as administrator, then become functus officio because the plaintiff had then attained majority by completing his twenty-one years in December, 1895. The lease was, therefore, unauthorised and not binding on the plaintiff: Khetlur Nath Doss v. Ram Jadoo Bhuttacharjee. With respect to all the leases we contend that the Collectors had exceeded their authority in creating a permanent tenure. Even at the time of the consolidated lease, the Collector, though he had obtained a certificate under the Minors' Act, had no authority to create a permanent tenancy because the Minors' Act contemplated alienations of short durations only. Even under the Guardian and Wards Act (VIII of 1890) the powers given to a guardian are limited. The Collector as representative of Government can have no greater powers than an ordinary guardian.

There is nothing in the case to show that we ratified the leases after we attained majority. Mere receipt of rent would not amount to either estoppel or ratification. There is no evidence to prove that we had full knowledge of all the terms of the leases. Actual knowledge on our part must be proved: Jugmohandas v. Pallonjee. As soon as we came of age we applied to the Collector to furnish us with copies and other papers relating to the transaction, and immediately after we learnt the terms of the leases we repudiated them and brought the present suit. The leases being void ab initio there can be no ratification of such leases.

The defendant would have been entitled to a notice to quit if he had admitted our right to recover possession as landlord, but he denied our right, therefore no notice was necessary. There was a distinct disclaimer of our title: Venkaji v. Lakshnan (3) Baba v. Vishvanath (4); Gepalrao v. Kishor (5); Vivian v. Moat. (6)

The Judge found that our claim was not time-barred, but he dismissed our suit on the ground that the defendant had acquired a permanent tenancy.

Scott, Advocate General (with Branson, Raikes and Rustam

^{(1) (1875) 24} Cal. W. R. 49.

^{(2) (1896) 22} Bom. 1.

^{(3) (1895) 20} Bom. 354.

^{(4) (1883) 8} Bom. 228.

^{(5) (1885) 9} Bom. 527.

^{(6) (1881) 16} Ch. D. 730.

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B Paymaster) appeared for the respondent (defendant):—The plaintiff cannot repudiate the leases granted to us by the Collectors as representatives of Government because his father by a treaty agreed to conduct himself in conformity with the orders of Government: see Aitchison's Treaties, Vol. VI, pages 424 and 428, No. CLV, clauses 13 and 15. Under the terms of that treaty his son succeeded to the estate under the orders of Government. This was one of the reasons why the Thakore's estate was placed under attachment after his death. The order for attachment was in force when the last consolidated lease was passed. Therefore the Collector's authority had not, till the removal of the attachment, come to an end. The consolidated lease may, therefore, be taken to have been granted by the Collector as parens patrice.

The definition of British India given in the General Clauses Act X of 1897 is much wider than that given in the former General Clauses Act I of 1868. The definition given in the Act of 1868 did not bring the Panch Mahals within British territory: Tricsam Panachand v. The Bombay Baroda and Central India Railway Co.(1); Queen-Empress v. Abdul Latib.(2) As they had not been vested in British Government under Statute 21 and 22 Vict., ch. 106, s. 1, they could not be governed by the provisions of the Registration Act III of 1877. Further, though under section 98 of the Registration Act XX of 1866 that Act was made applicable to the Panch Maháls, still under Act XIV of 1870 the Panch Mahals were taken out of the operation of the Act of 1866. We, therefore, contend that the leases did not require registration. Even supposing that they did require registration and being unregistered they could not affect immoveable property, still they can be looked to for the purpose of ascertaining what was in the contemplation of the parties: Lalla Gopee Chand v. Shaik Liakut. (3)

The plaintiff having recovered rent after he came of age, he is estopped from denying our permanent tenancy: Ram Chander Sirca v. Pran Gobind. (4)

As to ratification the plaintiff having asked for copies of the

^{(1) (1885) 9} Bom. 244.

^{(2) (1885) 10} Bom. 186.

^{(8) (1876) 25} Cal. W. R. 211.

^{(4) (1876) 25} Cal, W. B. 71.

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consolidated lease and other papers after attaining majority he must be presumed to have had knowledge of the terms of the lease, and as he did not appear in the witness-box to rebut the presumption by denying knowledge, the presumption becomes stronger: Bolton Partners v Lambert. (1)

We have been in possession as of right since the dates of the several leases. We entered into possession as of right and continued to hold it as such for upwards of twelve years. Our possession was therefore adverse. Though the plaintiff was a minor, still his interest was represented by the Collector as guardian, and we became permanent tenant under that guardian. If the plaintiff wanted to repudiate the act of the guardian, he ought to have done so within three years after he attained majority. Under any view of the case the claim is time-barred.

Next we contend that the suit is bad for want of notice to quit. We never denied the plaintiff's title as landlord. Our case was that we were tenant entitled to hold the lands permanently. A plea of this kind is not denial of landlord's title and would not dispense with notice: Krishna Sakharam v. Ladu Vithu. (2)

Inverarity, in reply.

BATTY, J.: In this case the plaintiff, Thakore of Kanjeri and other villages of Panch Maháls, sued to obtain a declaration that the defendant holds certain lands as his yearly tenant and also to recover possession thereof. The facts undisputed in this case The plaintiff was born on 8th December, 1874. are as follows. His father died in 1877. The zillah of Panch Mahals was at that time a scheduled district. It had been transferred to the British Government in 1861, Bombay Gazetteer, 253. The Minors' Act XX of 1864 was not in force in that district in 1877-vide section 5 and schedule 3 of the Laws Local Extent Act, 1874. It came into force on 1st May, 1885, under the Panch Maháls Laws Act (VII of 1885) when the district ceased to be a scheduled No statutory provision for the appointment of a guardian existing, the Collector, on the late Thakcre's death, reported the fact, and asked and obtained the sanction of Government to the attachment and management by his office of the

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estate during the minority,—Government intimating that on ascertainment of the debts owing by the late holder, they would determine the plan for their liquidation (Exhibit 106, page 58). Thereafter the Collector, without applying for or obtaining further orders from Government, after some correspondence, executed in favour of the present defendant the four successive documents, Exhibits 59, 60, 61 and 62, under which the defendant claims to hold the lands in dispute, some 11,000 acres, as a permanent tenant. Of these documents, Exhibit 59 bears date 29th June, 1881; Exhibit 60, 21st November, 1881; and Exhibit 61, 26th February, 1884—all prior to the operation in the district of Act XX of 1864, and therefore without the grant of a certificate of guardianship to the Collector thereunder. The defendant obtained possession which purported to be given in pursuance of these documents. But in 1890 some doubt being entertained by the Collector as to the validity of the arrangement made with the defendant in view of the introduction into the Panch Mahals of the Acts and Regulations applying to the rest of the Presidency, it was proposed that the Collector, who had obtained in 1886 a certificate under Act XX of 1864 and was thus governed by the Guardians and Wards Act of 1890, should execute with the necessary sanction a revised and consolidating lease for the purpose of securing the defendant's position. The then Legal Remembrancer having advised in favour of this course, Government by G. R. No. 5008, R. D. of 18th July, 1890, directed his report to be forwarded "for information and guidance" to the local authorities, without further expressing their views or wishes (Exhibits 100 and 101, pages.53-55). In May, 1896, the plaintiff attained his majority. It was not till 30th May of that year that the Collector, purporting to act as administrator of the estate, executed Exhibit 62 as a new consolidating grant of the lands in question to the present defendant in terms which were, it seems, intended to be identical with those specified in the preceding documents, Exhibits 59, 60 and 61, which it purported to cancel. This document was registered. None of the previous documents, Exhibits 59, 60 and 61, were registered. The Thakore appears to have received charge of his estate from the Collector on 16th January, 1897, Exhibit 117, page 63,

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receiving at the same time a large number of papers including a file of grants or patas purporting to be under rules known as the Waste Land Rules.

On 5th May, 1897, the plaintiff, referring to the removal of the so-called attachment from his State and the delivery of charge to him, in a letter to the Collector observed that during the guardianship two villages had been given on grants and requested that the originals should be supplied to him with all papers bearing on the subject (Exhibit 111, page 59).

On 9th November of the same year the plaintiff again addressed the Collector (Exhibit 118, page 65, Exhibit 95, page 48) on the same subject naming the defendant as the grantee, stating that previous grants had been made and that a new grant had been more recently made and registered and desiring a copy as none had been sent. On 16th December of the same year the plaintiff again applied for the grant to be sent to him (Exhibit 94, page 48, and Exhibit 112, page 59) referring more definitely to the grants as made to the defendant under the Waste Land Rules. On a further application, dated 17th May, 1898, the copy of the document of 1896 appears to have been supplied to the plaintiff on 23rd September, 1898 (Exhibit 93, page 46). plaintiff admits in paragraph 4 of his plaint (page 2) that he received rent from the defendant for two years 1897-98 and 1898-99. But on the 11th January, 1900, he wrote to the defendant (Exhibit 140, page 90) stating that as the defendant refused to vacate and claimed as a permanent tenant under a lease of which the plaintiff knew nothing, notice of a suit for ejectment, in case this hostile claim was not withdrawn, was thereby given. And on the defendant replying on 13th January, 1900, that he relied on the lease from the Collector as guardian and administrator of the plaintiff (Exhibit 64, page 40), the plaintiff two days later, i.e., on 15th January, 1900, filed this suit.

Such being the main facts in the suit, the questions that arise appear to be as follows:—

⁽¹⁾ Whether the Government of Bombay as parens patriæ had power to authorise the grant of a permanent tenure to the defendant under any circumstances?

⁽²⁾ Whether if they had such power, circumstances of the necessity of the estate or of benefit to it justified their authorising such a grant?

(3) Whether the Government did in fact either authorise or ratify such a grant?

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- (4) Whether in the absence of authority for such a grant or of its ratification, the Collector could, as de facto guardian and administrator, give such a grant?
- (5) Whether if the Collector could do so, the documents of 1881 and 1884, Exhibits 59, 60 and 61, being unregistered are admissible in evidence to prove such grants?
- (6) Whether those documents, if admissible in evidence, are affected by the later document, Exhibit 62 of 1896?
- (7) Whether the Collector having executed Exhibit 62 after the plaintiff had attained majority could and did bind the plaintiff thereby?
- (8) Whether the plaintiff by his receipt of rent for 1897-98 and 1898-99 ratified or acquiesced in all or any of the grants in question?
- (9) Whether if the grants to the defendant are unestablished either by reason of the documents to evidence them being inadmissible or by reason of want of authority in the Collector to execute them, the defendant has acquired a title either as permanent tenant or as absolute owner by adverse possession under the Limitation Act?
- (10) Whether if the defendant by reason of the invalidity of the documents in question were a yearly tenant only, he can be ejected without due notice on his repudiation of the plaintiff's title as landlord?
- (11) Whether if he be liable to ejectment he is entitled, either under section 51 of the Transfer of Property Act or in equity, to compensation for the present estimated value of improvements made by him, or to a lien on the property for the amount?

It does not appear necessary to discuss all the above questions at length. The guardianship of Government as parens patriæ [Mayne's Hindu Law 265; West & Bühler 541, note (e)] is not disputed. Authorities as to the limitations of its power as such have not been cited. It is not. however, contended that such power would be unlimited, or would extend to the absolute alienation of the ward's property without regard to justifying necessity and the interests of the minor. This indeed seems to have been recognized in the G. R. No. 5282 delegating management of the estate to the Collector, which authorises nothing but management, and reserves to Government the power to determine the best plan for liquidation of debts. It is contended for the defendant that the action of the Collector was ratified by G. R. No. 5008. But that document contains no express approval of what had been done and intimates rather that the Collector should be guided by the Legal Remembrancer's opinion that the Collector should

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comply with the requirements of the Guardians and Wards Act, in order to secure to the defendant the benefits of past transaction. Moreover it is doubtful whether Government were in full possession of all the facts, as to the three documents, Exhibits 59, 60 and 61, which are referred to as if only one agreement or lease had been entered into. And full knowledge is essential to ratification: Lewis v. Read m; Hilbery v. Hatton (2); Marsh v. Joseph. (2) Moreover G. R. No. 5008 is dated 1890, and as its contents indicate was subsequent to the appointment of the Collector under Act XX of 1864, whereby the guardianship of Government had determined. And there can be no ratification by a person who at the time of ratification could not have done the act himself even though he had the power to do it when the original act unauthorised by him was done. For no one can supply an authority who does not possess it: Bird v. Brown.(4) That the Collector, acting on behalf of Government, could. without precedent authority or subsequent ratification, validly lease the minor's property in perpetuity has not been shown, and as observed already, Government apparently contemplated the reservation to itself of authority for such purpose.

The next question that arises is whether the documents. Exhibits 59, 60 and 61, being unregistered are admissible in evidence. It is contended that as the Panch Mahals were never in the possession or under the Government of the company they did not vest in Her Majesty by section 2 of 21 & 22 Vict., c. 106, and were therefore not British India within the meaning of section 2 (8) of the General Clauses Act, 1868, which governed the Registration Acts of 1871 and 1877, and were therefore not included in the extent of those Registration Acts, "the whole of British India." It is however contended with much force that section 2 of 21 and 22 Vict. c. 106, vested in Her Majesty not only all territories then in the possession or under the Government of the company, but also all rights which if that Act had not been passed might have been exercised by the said company: so that all subsequent acquisitions obtained by exercise of those rights became vested in Her Majesty, and thus come within the words in section 2 (8)

^{(1) (1845) 13} M. & W. 834, (2) (1864) 33 L. J. Ex, 190.

^{(3) (1897) 1} Ch. 213. (4) (1850) 19 L. J. Ex. 154,

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of the General Clauses Act, 1868, "the territories for the time being vested in Her Majesty," which phrase is equivalent, it is urged, to that used in section 1 of the Indian Penal Code, "the territories which are or may become vested in Her Majesty by the Statute, &c." There can, it seems, be no question that the Panch Maháls are, and in 1871 as well as in 1877 were, by virtue of the rights transferred in the Statute, vested in the Crown: and not only general acceptation, but legislative expression is in favour of the construction that as such they became so vested by the Statutes, and were thus within the definition of British India in the General Clauses Act of 1868. But even if there were room for doubt on this point, it is manifest that registration of such documents as those in question was compulsory in the Maháls at the dates they bear. For Act XX of 1866 came into operation there on 1st May, 1866, under section 98 of that Act, and the repeal of that section by Act XIV of 1870, as spent, did not under section 1 of that Act affect its already completed operation. And if the Act of 1871 did not come into force in the district as part of British India, neither did it repeal Act XX of 1866 therein by its first schedule and second section, and Act XX of 1866 must have remained in force there till the General Clauses Act, 1897. Section 49 of Act XX of 1866 read with section 17 rendered such documents as Exhibits 59, 60 and 61 inadmissible if unregistered, and the exemption in Act XXVII of 1868 of grants by Government, if operative in the district at all, was limited to "grants in reward for special services." These last words are not, it is true, reproduced in section 97 (1) of the Registration Act, 1871, or in section 90 (d) of the Registration Act, 1877. But those clauses manifestly exempt only grants or assignments by Government which under the respectively succeeding sections are kept open to inspection, and do not cover private documents purporting to be executed on behalf of minors or other private individuals. appears that the documents in question cannot be received in evidence or affect any property comprised therein, if section 49 of Act XX of 1866 apply thereto. I think, however, that, as so strenuously and ably contended by the learned Counsel for the plaintiff, the Act of 1877 was in force at date of those documents.

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The provisions of section 49 of that Act differ from those used in the Act of 1866, and this indicates distinctly the intention of the Legislature in the more recent Act not to exclude as altogether inadmissible in evidence documents unregistered though compulsorily registrable, but only to prevent their affecting immoveable property comprised therein, and their reception as evidence of any transaction affecting such property. The importance and effect of this modification will be considered later. It is unnecessary to consider what effect Exhibit 62 would have on Exhibits 59, 60 and 61, and it is indeed admitted that if void itself it could not operate to cancel them.

Exhibit 62 is itself open to the objection that it was executed by the Collector after he was functus officio as guardian by reason of clause (c) of sub-section 2 of section 41 of the Guardians and Wards Act, 1890. It is contended, however, that the plaintiff ratified it; and respondent relies in this connection on the cases of Ram Chunder v. Pran Gobind (1) and Bolton Partners v. Lambert.(2) In the first of these cases, the disputed lease was executed on behalf of the minors by their mother as natural and de facto guardian and on behalf of the adult Pran Govind by his brother who then acted and always had acted as agent for him in connection with the property. Bolton Partners v. Lambert was a case of ratification by a principal of an acceptance by one Scratchley purporting to act as his agent. These cases therefore would not apply unless either the Collector were administrator or purported to act as agent of the plaintiff. He was not administrator. It was therefore necessary, as he was not expressly or impliedly authorised by the plaintiff, to show that the Collector acted as the plaintiff's agent: section 196 of the Contract Act and Wilson v. Tumman (3); Saunderson v. Griffiths (4); Brook v. Hook (5); Marsh v. Joseph. (6) In the document itself the parties are not so stated, the name of the principal not being first mentioned as a party, and the Collector is described as administrator. The Collector it is true purports to have affixed his own seal "on behalf of the present minor," but that is not as his agent but as administrator.

^{(1) (1876) 25} Cal. W. R. 71.

^{(2) (1889) 41} Ch. D. 295, 301.

^{(3) (1843) 6} M. & G. 236.

^{(4) (1826) 5} B. & C. 909.

^{(5) (1871)} L. R. 6 Ex. 89.

^{(6) (1897) 1} Ch. 213, 238.

Had the Collector been administrator at the time, a different principle would have applied, and the cases relied upon for respondent, Ram Chunder v. Pran Gobind (1) and Gopalnarain v. Muddomutty (2), would have been in point. But as the Collector was not administrator and did not purport to act as agent, the plaintiff was not bound by and could not ratify the transaction.

The question of ratification being irrelevant, it is proposed for respondent to rely on alleged acquiescence by the plaintiff indicated by his receipt of the rent after knowledge of the alleged grant. And an attempt has been made to distinguish the present case from that of Jugmohandas v. Pallonjee (3) on the ground that in Jugmohandas' case the plaintiff proved that he knew nothing of the lease which he repudiated; whereas in the present case the plaintiff has not even come forward as a witness. In answer to the plaintiff's contention that an invalid lease could not be confirmed by the acceptance of rent only, without any intention of thereby confirming the lease, Woodfall, 15th Edition, page 221, and Ex parte Cooper, In re North London Railway Company (4); Robson v. Flight (5) are cited, and it is urged that "acquiescence to 'deprive a man of his legal rights,' as stated in Willmott v. Barber (6) 'must amount to fraud,' and he must be shown to have acted in such a way as would make it fraudulent to set up those rights." In reply it is urged for respondent that under the ruling in Sitabai v. Wasantrao (7) and Sarat Chunder v. Gonal Chunder (8) knowledge of the falsity of a belief induced is not necessary in a person bound by an estoppel. This argument seems to ignore the distinction between estoppel and acquiescence. In Sitabai's case as in Sarat's case, the acquiescence in question was during the progress of an uncompleted act from which the other party might, but for that acquiescence, have abstained. But the defendant in this case has adduced no evidence of any specific expenditure incurred or act done by him in consequence of the plaintiff's receipt of his rent. The case of De Bussche v. Alt (9), cited for appellant, makes clear the

(9) (1877-78) 8 Ch. D. 286, 314,

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re v. Art o, cited for appellant

^{(1) (1876) 25} Cal. W. R. 71. (5) (1865) 34 L. J. Ch. 226. (2) (1874) 14 Beng. L. R. 21. (6) (1880) 15 Ch. D. 96, 105.

^{(3) (1896) 22} Bom, 1. (5) (1880) 15 Ch. D. 96, 105. (7) (1901) 3 Bom, L. B. 201 at pp. 208, 210,

^{(4) (1865) 34} L. J. Ch. 373. (8) (1892) L. R. 19 I. A. 203; 20 Cal. 296.

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distinction between acquiescence in an act which is still in progress, and mere submission to it when it has been completed. In the first case it may operate as an estoppel if it have induced action infringing a right. In the second case, submission could not change the past, and as stated in that case "the right of action once vested cannot, at all events as a general rule, be divested without accord and satisfaction, or release under seal." Estoppel by acquiescence has no application to an ex post facto submission not amounting to ratification, and inducing no action or omission, and is consequently insufficient to constitute what in such ease would be necessary, viz., accord and satisfaction with full knowledge. The distinction is recognized in Jannadas v. Atmaram.(1) Acquiescence after a fait accompli, if not prolonged beyond the verge of limitation, is no bar to a right of suit already accrued: Uda Begam v. Imam-ud-din (2); Peddamuthulaty v. N. Timma Reddy (3); Juggernath Sahoo v. Syud Shah. (4)

The question, therefore, now arises whether the plaintiff has brought his suit within time, and this seems to be the really important issue in the case. The learned Counsel for the plaintiff contends as follows:-The defendant by entering under a void lease and paying rent became a yearly tenant and continued to be so, and the relation of landlord and tenant thus once established, the possession of the defendant could not at any time have been adverse to the plaintiff as landlord. The documents under which the defendant claims, he urges, were void ab initio and not voidable. They could not be and were not ratified, and the case of Doe d. Rigge v. Bell (5) is cited as showing that under English Law the position of the defendant would be that of a yearly tenant. Thus the learned Counsel contends the defendant had no adverse possession: he thought he was a lessee, but he was not: his possession was never challenged: it was therefore never adverse until the plaintiff claimed, and the defendant denied, the right to evict: and no bar has arisen under article 144 of the second schedule to the Limitation Act, 1877, and the defendant now having repudiated

^{(1) (1877) 2} Bom. 138, 137.

^{(2) (1875) 1} All. 82.

^{(3) (1864) 2} Mad. H. C. 270. (4) (1874) 23 W. R. 99, P. C.

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his landlord's title, the landlord, the plaintiff, can evict without six months' notice: Vivian v. Moat.(1) The tenancy from year to year, it is urged, had not been determined previously and therefore time did not begin to run against the plaintiff until the defendant's possession became adverse by the setting up of the permanent tenure, and article 139 applies. And if the right to possession be barred, the plaintiff contends he is at least entitled to a declaration that he is not bound by the lease and his suit would then fall within article 120, time beginning to run only from the date when the plaintiff's title was denied. Article 144, it is urged, does not apply when the suit is otherwise specially provided for and therefore has no application here. Mr. Inverarity further argues that the plaintiff does not derive his title through or under the grants of the defendant (Runchordas v. Parvatibai (2)) and the case of Gnanasambandha v. Velu (3) relied on for respondent has therefore no application. To these arguments for the plaintiff, the learned Advocate General for respondent replies that if the leases are void, the possession of the defendant became adverse from the date when he entered; that the defendant has therefore acquired an absolute title; that in any case his adverse possession of a limited interest can be set up (Madhava v. Narayana (4)); that the plaintiff was affected by that possession as the Collector represented him, and the plaintiff was not in the position of a reversioner coming in on the determination of a particular estate; that the defendant was not a tenant from year to year but entered under a lease; that the leases may be looked to for the purpose of showing the adverse nature of the possession (Lalla Gopee v. Shaikh Liakut (5)) and that the plaintiff but for his minority would have been barred in 1896 at latest; that he had three years to sue from the date of his attaining majority on 8th December, 1895, and that as the suit was not instituted till 15th January, 1900, it was time-barred. In considering these arguments it is to be noted in limine that the plaintiff in para. 7 of his plaint and his learned Counsel throughout this

^{(1) (1881) 16} Ch. D. 730.

^{(2) (1899) 23} Bom. 725, 736. (4) (1885) 9 Mad. 244,

^{(3) (1899)} L. R. 27 I. A. 69; 23 Mad. 271.

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appeal contend that the lease was void and not voidable. If the plaintiff entirely repudiates the representative character of the Collector, denies his power to manage and protect the property and to create a tenancy of any kind, and treats the demise as one made by a stranger, then his case would seem to be that the defendant's possession was that of a trespasser ab initio, and time would apparently run from the date when the leases were granted. In the case of Governors of Magdalen Hospital v. Knotts (1) where the lease then in question was held to be absolutely void within 13 Eliz., c. 10, the right of re-entry was held to have arisen from the moment of the execution of the lease, and was held barred by adverse possession. Lord Selbourne in that case was alone in the dictum that if rent however small had been reserved and received, it would have created a tenancy from year to year and limitation could not have run. The remark was not necessary to the decision of the It was apparently obiter and takes no account of the tenancy-at-will which in the absence of rent would have been called into existence and afforded a bar similar to that of a yearly tenancy. And the rulings in Attorney General v. Davey (2) (by Lord Chancellor Chelmsford and Lord Justices Turner and Knight Bruce), and in Attorney General v. Payne (3) of the M. R., where rent had been reserved and paid, show that circumstance to be immaterial as an answer to adverse possession under a void lease.

The contention of the learned Counsel for the plaintiff, that the possession of the defendant, though it may have been adverse to the Collector while representing the minor, was not adverse to the plaintiff, appears to me to be untenable. Section 7 of the Limitation Act clearly contemplates the accrual of a right to sue during disability (Mahipatrav v. Nensuk (4)), and special provision limits the right of suit after the disability has ceased. The possession of the defendant if adverse at all was no less adverse merely because there was some one who might have instituted a suit on his behalf. And as stated in Radhabai v. Anantrav (6),

^{(1) (1879) 4} Ap. Cas. 321.

^{(3) (1859) 27} Beav. 168.

^{(2) (1859) 4} De G. & J. 186. (4) (1869) 4 Bom. H. C. 199, A. C. J.

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"a restricted power of dealing with the property does not involve an incapacity of submitting to adverse possession until limitation has given a title by prescription to the adverse holder." Collector was the manager of the plaintiff's estate for the time being and entrusted with the protection and custody thereof from the first. And it is only by admitting that the Collector so far acted as his representative and not as a stranger in adverse possession; that the plaintiff can allege that the Collector created on his behalf a tenancy-at-will, or from year to year by acceptance The further contention for the plaintiff, that a tenant in this country cannot plead the right of a permanent tenure by adverse possession, also seems to me in view of a long series of decided cases to be untenable. The following cases (cited in their chronological sequence) show how continuous the current of decisions has been in this direction. In Shaikh Nujmoddeen v. Lloyd (1), it was said "the rule that a tenant cannot plead limitation against his landlord, as laid down in Watson v. Rance Shurut Soonduree Debia (2) in which previous decisions are cited, appears to be too general in its terms. That this view was not taken by their Lordships in the case of Raja Saheb Prahlad Sen v. Durga Prasad Tewari (3) and in Raja Saheb Prahlad Sen v. Run Bahadur (4) is clearly deducible from the judgments in those cases though not expressly stated in so many words." And the judgment cited proceeds fully to state the ground for this deduction, which appears on a reference to the Privy Council cases in question which were taken as having clearly settled the point. Next in point of time is the case of Tekaetnee Goura Coomarce v. Mussamut Saroo (5), a Privy Council case, from which a similar deduction arises in connection with the following passage in their Lordships' judgment:-"The High Court overruled the decision of the Court of first instance upon the Statute of Limitations, holding, and their Lordships are of opinion rightly, that the Statute does not begin to run in favour of the Mokurrureedar against a Zemindar until the Zemindar has had notice that the Mokurrureedar claims

^{(1) (1871) 6} Beng. L. R. 130; 15 W. (3) (1869) 2 Beng. L. R. 111; 12 M. R. 232. I. A. 286.

^{(2) (1867) 7} W. R. 395.

^{(4) (1869) 2} Beng. L. R. 111; 12 M. L. A. 289.

THAEORE FALESINGUE V. BAMANJI A. DALAL under a mokurruree grant, and in this case it was not shown that notice had been given to the plaintiffs of such a tenure twelve years before the commencement of the suit." In 1873 the Full Bench decision of the Calcutta High Court in Dinomoney Dabea v. Durgaprasad (1) allowed limitation to be raised by a trespasser setting up but failing to prove a tenancy, and in Petambar Baboo v. Nilmony Singh (2) distinct notice of a claim on the part of the grantor to hold in perpetuity and not subject to resumption, if uncontested for twelve years, was held a bar pro tanto of the landlord's title.

The Bombay High Court in Maidin Saiba v. Nagapa (3) held Dinomoney's case conclusive as to the right of the defendant to plead both tenancy and limitation, but in that case the defendant was regarded as having been throughout a trespasser, and the Madras High Court in Madhava v. Narayana (4) followed this last mentioned case and Dinomoney's case as showing that a party who cannot by his admission plead prescription as to general ownership, may yet rely on it with regard to a subsidiary interest claimed by him. Narayan v. Yamunabai (5) appears to rest on the principle that the lease granted having been beyond the powers of the lessor a yearly tenancy and not a perpetual tenancy was presumable, but to have contemplated it as possible that the tenant might have set up limitation if there had been no recurrent act between the parties inconsistent with the doctrine of adverse possession, by which it seems reference was made to the yearly payment of rent as an admission of a tenancy that could be referred to no legal title but that of a tenant from year to year. That the fact of a yearly payment, however, is not fatal to a plea of adverse possession was distinctly held in Sankaran v. Periasami. (6) There it was objected that possession never was in fact adverse because poruppu (a quit rent: Wilson's Glossary) was always paid. But following Madhava v. Narayana (4) it was held a sufficient answer to objection on that score, that possession of a limited interest in immoveable property may be just as much adverse for the purpose of barring a suit for the determination of

^{(1) (1873) 12} Beng. L. R. 275.

^{(2) (1878) 3} Cal. 793.

^{(3) (1882) 7} Bom. 96, 99.

^{(4) (1885) 9} Mad. 244.

^{(5) (1889)} P. J. 136.

^{(6) (1890) 13} Mad. 467.

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that limited interest, as is adverse possession of a complete interest in the property to bar a suit for the whole property. In Bhagu v. Byramji (1) a claim to hold property comprised in an unexpired lease, in conformity with and by virtue of its terms, was held to make the possession adverse to those who claimed as owners. And the last three cases were cited with approval in Budesab v. Hannanta (2) where several of the cases cited above were discussed. That of Madhava v. Narayana, (3) of all those there cited, appears to be the one most nearly on all fours with the present case. For there it had been urged that possession was under an invalid kanam and possession for twelve years was a sufficient answer to a claim to eject. A kanam is defined in Wilson's Glossary as an arrangement by which the landlord holds a deposit for security for his rent when lands are taken on a stipulated rent upon lease for a given term of years. The result of this and other decisions cited in Budesab's case was referred to in that case by Sir Charles Farran as "certainly authority for the proposition that a landlord allowing a tenant to assert the validity of an invalid lease for the statutory period of more than twelve years, may be debarred from subsequently questioning the right of the tenant to hold under its terms."

This view, that the assertion of a title under an invalid lease if allowed by the landlord would raise a bar, does not seem to have been suggested or considered in the case of Jugmohandas v. Pallonjee (4) relied on for the present appellant. In Jugmohandas's case the Court (Mr. Justice Strachey) seems to have assumed that because it had never occurred to any one to doubt the validity of the lease, until after the plaintiff had attained his majority, the previous possession till then under the lease was not adverse, and that the plaintiff had twelve years from the date of his discovering its invalidity before he could be barred by article 144. The effect, however, of acquiescence in the defendant's assertion of title was discussed rather with reference to the question whether the plaintiff had ratified, or estopped himself from disputing, the lease (vide page 11 of the judgment) than with reference to the question whether defendant's possession

^{(1) (1892)} P. J. p. 39.

^{(2) (1896) 21} Bom. 509, pp. 514-515.

^{(3) (1885) 9} Mad. 244.

^{(4) (1896) 22} Bcm. 1.

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in asserting it was adverse. But the case of Vithalbowa v. Narayan (1) shows that a tenant's possession in the assertion of a claim to be a permanent tenant would be none the less adverse to the owner during years when there was no manager at all to represent the owner. A fortiori it would be none the less adverse because of the existence of a manager or guardian who was capable of representing the owner, and who knew of the assertion of such title, and his inaction or acquiescence would not prevent the possession from being adverse. It is the knowledge of the owner or of one representing the owner, of the assertion of such title, which causes time to run: Gangabai v. Kalapa (2) and compare the cases cited above of Shaikh Nuzmoddeen, Raja Saheb Prahlad Sen and Madhavav. Narayana. No doubt in some of the cases cited above, following Dinomoney's case, the plea of adverse possession was admitted on the ground that the defendant, if not a tenant from year to year, was a trespasser throughout. And it is urged that the defendant in this case cannot be regarded as a trespasser throughout inasmuch as having entered under a void lease, a tenancy from year to year must be presumed. That this rule applies in India so as to exclude all evidence that the person entering into possession asserted and maintained any other ground of title has not been supported by the citation of any authority. The passages cited from Woodfall on Landlord and Tenant no doubt show that if a man entered under a void lease he is not a disseisor, but a tenant-at-will under the terms of the lease in all other respects except the duration of time, and when he pays or agrees to pay any of the rent therein reserved. he becomes a tenant from year to year upon the terms of the void lease, so far as they are applicable to and not inconsistent with a yearly tenancy (Woodfall, 15th Edition, pages 93, 143, 231, 232, 358, where the tenancy from year to year is spoken of as implied by law from the payment and acceptance of rent or other circumstances, 364, 376). The leading case cited is Doe d. Rigge v. Bell.(3) In Doe d. Rigge v. Bell (3) the defendant had paid rent. Both that case and Clayton v. Blakey (4) were decided under the Statute of Frauds, which contained express provision that a lease for more

^{(1) (1893) 18} Bom. 507, p. 511.

^{(3) (1794) 2} Sm. L. C. 116; 2 R. R. 642, (4) (1798) 8 T. R. 3.

^{(2) (1885) 9} Bom, 419.

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than three years not reduced into writing should operate only as a tenancy-at-will. There is no similar provision in the Indian Statute Book. Nor, on the authority of Lord Chelmsford, Lord Chancellor, in Attorney General v. Davey, (1) is there any case in which possession taken under a void lease, as in that case, has ever been dealt with in equity as a lease from year to year. The case there dealt with was one of a lease with rent reserved, apparently void under 13 Eliz., c. 10. Section 116 of the Evidence Act precludes a tenant from denying that his landlord has a title at the beginning of the tenancy. But the authorities show that a tenant in India is not precluded by an admission of tenancy from showing that the nature of the tenancy asserted by him to the knowledge of the landlord has been for the period prescribed by the Limitation Act pro tanto adverse to the right to evict either at will or on notice given. The question then is, not what was the right which actually existed at the beginning of the tenancy, but what was the right which he has openly enjoyed to the knowledge of the owner or his representative for the time being. A manifest assertion by the tenant to the knowledge of the person representing the landlord's interests of a right inconsistent with that claimed by the landlord to treat him as a tenant-at-will or from year to year, would be a disclaimer of the landlord's title under the ruling in Vivian v. Moat (?). But then it is urged that though the disclaimer would work a forfeiture it would still be at the election of the landlord to determine the tenancy or to waive the forfeiture, and the waiver would operate only in respect of each successive year. Thus it is contended that until the landlord demanded and the tenant refused surrender, there would be no determination of the original tenancy-at-will or from year to year, and the possession of the tenant could never become adverse. This position has not been supported by citation of authorities and appears to be fully answered by the considerations set forth in the judgment of the Court of Appeal (James, Cotton and Thesiger, L. JJ.) in Governors of Magdalen Hospital v. Knotts.(3) The contention might be sustainable in a case of express waiver of forfeiture restoring the

^{(4) (1859) 4} De Gex. & J. 136. (2) (1881) 16 Ch. D. 730. (3) (1878) 8 Ch. D. 709 at pp. 718—723.

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parties to the status quo ante, and thus implying the re-establishment of the landlord's claims. But it would be inconsistent with the decided cases and especially with that of Gopalrao v. Mahadeorao (1) to hold that a landlord, merely by receiving rent from his tenant, could preserve his right to other claims continuously denied by the tenant. In such a case section 23 of the Limitation Act could not apply. The relation of landlord and tenant may be continued by the admissions of the parties. such admission cannot create, preserve or revive as undisputed conditions of its continuance rights in conflict with claims openly asserted and not withdrawn by the tenant who is suffered to continue in possession. In such circumstances the continuance of the defendant in possession evidences not a mere waiver of forfeiture for disclaimer, but an admission pro tempore at least of the conditions insisted on. The plaintiff's Counsel contends that in such a case as the present the tenant may think he has a lease, but his thinking so does not make his possession adverse. this no doubt is indisputable. If the tenant does no more than think he has an adverse title, the bare belief could avail him nothing unless he could show that it was intentionally induced by the owner so as to bring into operation section 115 of the Evidence Act relating to estoppel. And I think a bare knowledge of the owner that a tenant proposes to rely on the assertion of a certain title would not in itself render the tenant's possession adverse. The owner in such case might well await actual resistance to or infringement of the rights claimed by him and till then would be under no necessity of taking action. But I also think if the tenant not only openly asserts to the knowledge of the owner an adverse interest, but proceeds to enjoy benefits claimable only on the basis of that interest, his possession at once becomes adverse and limitation begins to run against the owner from that time.

The fact that such assertion and enjoyment are not challenged does not change their adverse character, when once the necessity for challenging it has arisen. And in this case it seems impossible to close one's eyes to the fact that the adverse interest was openly asserted and so far enjoyed as to give full notice

of the nature of the tenancy claimed. For as the lower Court observes, Dr. Pollen (Exhibit 44) states that the fact that the defendant "held the lands as a permanent tenant was notorious" (page 13 of printed book). No suggestion has been made that this statement is not correct. Exhibit 67 deposes to the possession taken by the defendant on the basis of the Waste Land Rules. And indeed Exhibits 93 and 94 appear practically to admit that this was the nature of the tenancy which the defendant professed to hold. Exhibit 97 points to the same fact.

It has not been suggested that his possession was not held throughout on those terms (Exhibits 132, 133, page 80; Exhibit 134, page 82; Exhibits 135, 136). And the whole tenour of the correspondence and evidence recorded shows, I think, that the defendant from first to last claimed and enjoyed the benefits ordinarily granted under the Waste Land Rules. Among these benefits was the right to occupy for the first five years without payment of any rent at all. And it is not pretended that the defendant did not claim and enjoy that advantage which is certainly inconsistent with the position that he entered into possession as a yearly tenant. But the case of Attorney General v. Davey (1) already cited and that of Attorney General v. Payne (2) appear to show that in equity the circumstance that rent has been reserved by or been paid under a void lease, does not preclude the tenant who has entered into possession thereunder from setting up the plea of adverse possession as to a limited interest. And the assertion and enjoyment by him of rights only claimable in pursuance of the conditions of the lease was perfectly well known to the Collector who as manager represented the plaintiff's interest. The case of Lalla Gopee Chand v. Saikh Liakut (3) has been cited for respondent to show that an unregistered document when followed up by delivering of possession may be used as evidence of that possession. The case does not, so far as I can discover, appear to have been followed in any other authoritative decision. On the other hand, no case to contrary effect has been cited. A document inadmissible under section 49 could not, I think, be used as evidence of delivery of possession. For

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that would be to use it as evidence of the transaction itself. But seeing that the Legislature has advisedly rejected in the more recent Acts the phrases which made such unregistered documents absolutely incapable of being received in evidence at all, and has very guardedly stated the purposes for which they shall not be received, I think in the absence of authority to the contrary an unregistered document inadmissible for the purpose of affecting immoveable property or of any transaction affecting such property may yet be looked to, not in any way as creating a title, or as showing a transaction that affected the property, but merely as containing a clear and exhaustive statement of the adverse possession which was set up by a person whose claims were admittedly limited to the rights enumerated in such document. Viewed from this point, the document is only an explanatory statement that may conveniently be used as showing what is meant by, and virtually included in, oral or other evidence referring to such document as containing an exhaustive and accurate list of the claims set up by the defendant, A document used for this purpose does not affect the property at all any more than would a glossary referred to for the purpose of showing the full meaning of the words used in evidence. The document is still treated as absolutely inoperative. It is the adverse possession alone which affects the property. And the document does not evidence or affect that. Nor is the document used as evidence of any transaction affecting the property. For the transaction which is relied on as affecting the property is not a transaction to which the document refers, but the adverse possession extending over twelve years. Of that transaction or series of transactions the document does not even purport to contain any evidence. It proves nothing itself, but is a bare list in extenso of details compendiously stated by reference in evidence which proves transactions totally different in character and effect from that referred to in the document. The document so used is not even corroborative of the evidence as to the twelve years possession relied on as affecting the property, and adds nothing to that evidence which is not implicitly contained therein. In case of leases by parol for more than three years void under the Statute of Frauds, the

tenancy was in every respect other than that of duration regulated by the terms of the void agreements: Doe d. Rigge v. Bell (1). In such cases the lease was treated as evidence that the party consented to be tenant from year to year upon all the terms of the agreement not inconsistent with such a tenancy. A document inadmissible under section 49 of the Registration Act could not be used for the purpose of showing what were the terms consented to or as evidence of any implied transaction affecting the property. But if it is allowable for the defendant to plead adverse possession of a limited interest, and if independent evidence proves that adverse possession has been enjoyed, not of an absolute interest but of an interest limited by definite conditions, those conditions form an inseparable part of the adverse possession proved. And if the conditions are described in terms which are definite in themselves but which distinctly specify the conditions to be those contained in a certain book, enactment, set of rules or other document, such document must, I think, be looked to, not for the purpose of making it operative, but to show explicitly what was really included in the language used to describe those conditions. And thus if the defendant had proved possession in the assertion of claims identical with those of an occupant under the Bombay Land Revenue Code, there would have been nothing to prevent the Court from looking at that Code to see what was meant by the evidence. To do so would not make the Code affect the property or evidence any transaction. Here defendant appears from the evidence unquestionably to have held throughout in the assertion of claims identified as those which might have been set up by a person holding under the Waste Land Rules or the documents put in as Exhibits 59, 60 and 61. And I think those documents must be looked to, not to show that defendant had rights under any such rules or documents, but to show what is meant by the evidence describing the tenure which he claimed. This seems indeed absolutely necessary in order to ascertain what are the obligations towards the plaintiff which the defendant is, by reason of the admittedly

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limited interest asserted, still bound to observe. The next question that arises is whether notwithstanding adverse possession by the defendant of the limited interest asserted by him, the plaintiff can claim that his suit is within time under Article 139 or 120. But article 139 can only apply where the tenancy is proved to have determined and can have no application to a case where it is not terminable: Ram Chunder Singh v. Madho Kumari (1) where the Privy Council held article 144 the only provision applicable (vide page 493), and the only question was therefore whether a definite assertion of an adverse right had been made twelve years prior to suit. Their Lordships' finding was that no question of title or conflicting right had arisen prior to 1875, each of the parties consenting to go on as before, i.e., in the undisputed recognition of a tenancy which till 1875 had never been asserted to be anything but a tenancyat-will. In the present case, the occupation of the defendant in assertion of a right under the lease which involved a tenure rent-free for five years, gave full notice from the first of his claims to hold under the conditions of that lease and therefore it seems impossible to assume that the parties had consented to the continuance of a tenancy-at-will or a tenancy from year to year not set up by the one or admitted by the other.

The question, whether there was a terminable tenancy to which article 139 could apply, depends upon the question whether the plaintiff is or is not barred by article 144 from claiming possession in pursuance of such a tenancy, and thus in such a case the bar alleged to have arisen under article 144 is interposed before article 139 can apply. With regard to other articles of the schedule in the Limitation Act, the learned Counsel has throughout contended that the leases were void ab initio and there was therefore no necessity to set them aside, and article 91 being inapplicable, the only article which remains for consideration is article 120 in relation to the plaintiff's claim to a decree declaratory of his right. The declaration sought is that the plaintiff is not bound by the leases. But plaintiff, though not bound by the leases, is bound by the adverse possession of the defendant. The possession of defendant noto-

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riously holding as a permanent tenant was pro tanto adverse from the first. The cause of action having accrued during the plaintiff's minority, the plaintiff had, I think, at most three years from the date of his attaining his majority in which to recover possession, and no authority has been cited to show that in such a case, time having once begun to run, anything that has since occurred could stop it or give the plaintiff a new starting point. defendant was unquestionably in possession of a very large area of land which he had notoriously converted from barren and worthless jungle into an apparently thriving colony, supplied with houses, shops, fire-engine and water-cisterns, dispensary, hospital, school and post office. There could have been no reasonable ground at any time for supposing that the defendant had done all this as a yearly tenant or as a tenant-at-will. Nor is there any suggestion that he ever claimed to hold on any terms other than those which he set up from the first. There could have been no question that his possession was adverse to the right now claimed by the plaintiff, and no ground has been shown for holding in these circumstances that the plaintiff, on the cessation of his disability, could claim any extension of the three years allowed by section 7 of the Limitation Act as the period within which he could bring his suit.

The question, whether the terms of the leases which the Collector purported to grant were advantageous to the minor, is not one which it is necessary here to discuss. It is not alleged in the plaint that they were disadvantageous, or that better terms could have been obtained, but only that they were inoperative and not binding as against the plaintiff and void as beyond the powers of the Collector as administrator. Practically the only other objection taken in arguments was the sentimental objection of the plaintiff to the establishment on his estate of a permanent tenant on any terms in lieu of cultivators liable to eviction at short notice. The evidence indicates that till the land had been rendered by the defendant fit for cultivation, tenancies from year to year would have been out of the question. And having regard to the original condition of the land and to the expenditure of labour and capital incurred for more than twelve years on its improvement, it seems difficult to understand how the plaintiff could set up the contention that the defendant had been holding

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on a yearly tenancy. The permanent nature of the tenure which he claimed had been manifest or, as the Commissioner says, notorious from the first and throughout, and the plaintiff, if he wished to disturb his possession, could only do so by action brought within three years at most of his attaining majority. The plaintiff, it is to be hoped, will realize the permanent benefit conferred on his estate and will appreciate the superiority of his position as the overlord of an enterprising capitalist as compared with the precarious advantages he could have derived from the yearly tenancies of cotters. I do not think that there can be any doubt that the defendant has asserted his position as a permanent tenant on terms embodied in the leases of 1881 to 1884 ever since he entered into possession, and in these circumstances I hold that the plaintiff's claim, not having been brought within three years of the cessation of his disability, is time-barred. On these grounds I would confirm the decree of the lower Court and reject the claim with costs throughout.

The judgment of my learned colleague, Mr. Justice Starling, has been already delivered by me in accordance with consent given on behalf of the parties by their pleaders, before Mr. Justice Starling vacated his seat on the Bench.

STARLING, J.—One Dipsangji, the Thakore of Kanjeri in the Panch Maháls, died on the 7th August, 1877, leaving him surviving the plaintiff Fatesingji, who was born on the 8th December. 1874. The Panch Mahals had been ceded by Scindia to the British Government in 1861, but by Act XV of 1874, Act XX of 1864, the Bombay Minors' Act, had been declared not to be applicable to that district. Act XV of 1874 came into force on the 8th December, 1874. On the 29th August, 1877, the Government of Bombay sanctioned the attachment of all the property of the plaintiff's deceased father and appointed Mr. Wilson, the Extra Assistant Collector of the Panch Maháls, to manage the estate during the minority of the heir (see Exhibit 106), and from that time the plaintiff's estate was under the management of the Collector for the time being of the Panch Mahals. Before 1881 the defendant had been applying for a lease to him of certain waste lands in the plaintiff's estate, and in June and December, 1881, and February, 1884, three leases (Exhibits 59,

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60 and 61) were granted to the defendant of portions of such land by the Collector purporting to act on behalf of Government, but no specific sanction of Government was obtained to the leases. These three leases were not registered. The Bombay Minors' Act came into force in the Panch Maháls in 1885, and in 1886 the Collector obtained a certificate of administration to the plaintiff's property under that Act. The plaintiff came of age on the 8th December, 1895, but the administrator did not hand over his property to him on that day. On the contrary the then Collector. by his own order dated the 20th November, 1895 (Exhibit 142), and without the sanction of any superior authority, directed that the attachment of the estate was not to be removed for the present. and in fact it continued until the plaintiff received charge of his property on the 16th January, 1897. In the meantime, viz., on 30th May, 1896, the Collector executed a consolidated lease of the lands comprised in Exhibits 59, 60 and 61 to the defendant without any sanction from the Government or the District Court by which he had in the first instance been granted a certificate of administration (Exhibit 62). This lease was duly registered. In January, 1900, the plaintiff informally required the defendant to give up possession of the lands he was then in possession of (Exhibit 140), and on the 13th January the defendant claimed to hold the lands under Exhibit 62, and on the 15th January. 1900. the plaintiff brought the present suit to have it declared that the defendant was only a cultivator and to be put in possession of the lands. In his written statement the defendant rested his claim on the lease, Exhibit 62. Subsequently, however, in case that might be held to be inoperative he fell back upon the leases, Exhibits 59, 60 and 61. It is admitted now that the defendant cannot shelter himself under Exhibit 62 as one granted by the duly constituted administrator of the plaintiff's estate. because it was passed by one who although he had been an administrator of the plaintiff's estate had become functus officio at the time he executed it by reason of the plaintiff having before that time attained his majority. The defendant, however contended that since the plaintiff came of age he had ratified it. I am of opinion that this document is one capable of ratification by the plaintiff. Mr. Inverarity pressed upon the Court the

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language used by Lord Russell in Marsh v. Joseph (1): "the acts must have been done for and in the name of the supposed principal," and argued that the lease ought to have actually been made in the name of the plaintiff. I find, however, that in Bird v. Brown (2) Rolfe B. in dealing with the same point says: "If A. B. unauthorised by me makes a contract on my behalf with J. S., which I afterwards recognize and adopt, there is no difficulty in dealing with it as having originally been made by my authority." I think Mr. Inverarity is putting too literal an interpretation on the words of Lord Russell, and that all that is required is that the act should be done on behalf of the supposed principal, and in my opinion Exhibit 62 shews on the face of it that it was executed on behalf of the plaintiff. Has the plaintiff then ratified that lease? In order that ratification should be imputed to him he must in the first place have had a knowledge not merely of the existence of some lease, but of its terms also so that he might know what he was ratifying. The plaintiff knew of some lease in English having been granted in May, 1897, (Exhibit 111), no copy of it having been handed over to him on the 16th January, 1897, when charge of the estate was given him (Exhibit 117). He then wrote for a copy. He again applied for a copy by Exhibit 95, and subsequently by Exhibits 94 and 93 on the 16th December, 1897, and the 17th May, 1898, respectively, but he did not get one till the 16th September, 1898, (see endorsements on Exhibit 93). The only evidence there is of ratification subsequent to that date is the receipt of two instalments of rent in February and March, 1899, for the rent of the year 1898-99. These two instalments were not paid to the plaintiff himself but to his talati who would naturally receive them without any specific communication with the plaintiff. There is no receipt in respect of them put in evidence to show how they were received, and there is no evidence given to show that they were described when paid as being in fulfilment of any particular contract. Much less is there any evidence the plaintiff knew that these sums were about to be, or had been, paid in. The defendant was admittedly a tenant of some kind, and as such

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bound to pay rent. Consequently I am of opinion that though the receipt of rent from him by the plaintiff might have been an acknowledgment of a yearly tenancy (see Doed. Tucker v. Morse(1) and Doed. Pennington v. Taniere (2) it is not ratification of the lease of 1896, consequently the defendant cannot rely upon the rights given to him under that lease, but must fall back upon the Exhibits 59, 60 and 61. Whether they are of any good to him depends upon whether there was any Registration Act requiring such documents to be registered in force in the Panch Mahals in 1881 and 1884. Now there is no doubt that the Registration Act of 1866, Act XX of 1866, extended to the Panch Maháls, for it was so provided by section 98. If then the Panch Maháls were part of British India in 1871, Act XX of 1866 was repealed by Act VIII of 1871 and the latter Act substituted in its place and Act III of 1877 in due course repealed Act VIII of 1871 and became law in the Panch Maháls. If, on the other hand, the definition of British India in the General Clauses Act, 1868, did not include the Panch Mahals, the repeal of Act XX of 1866 by Act VIII of 1871 did not repeal it in that district and it continued in force in 1881 and 1884. It is conceded that in any event Act III of 1877 by operation of the General Clauses Act, 1897, section 3, clause 7, and section 4 was in force in the Panch Maháls from and after 11th March, 1897. It is not necessary for me to go into the question as to whether in 1881 and 1884 the Panch Maháls were British India because there was in those years as just shown some Act in force which required the registration of leases, and Act III of 1877 provides that no document which requires registration and is unregistered shall affect any immoveable property comprised therein or be received in evidence of any transaction affecting such property. The three leases (Exhibits 59, 60 and 61) requiring registration and not being registered cannot be relied upon by the defendant to defend his position as a permanent tenant. What position then does he occupy? His possession had a legal origin, therefore he cannot claim to be in adverse possession as owner contrary to the terms on which he admits he came into possession, which

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were those of tenancy. But a person who gets into possession under an invalid lease becomes a tenant-at-will and when he pays a yearly rent he becomes a yearly tenant. As a yearly tenant he cannot be turned out without a proper notice, i.e., a notice given at a proper time. The notice, Exhibit 140, is not a notice to quit, and that is the only notice proved in the case. Consequently the plaintiff is not in the position which he takes up in this suit entitled to eject the defendant unless the reply of the defendant, Exhibit 40, was such a denial of the plaintiff's title as to entitle him to eject the defendant without notice. In my opinion there was no denial of the plaintiff's title as landlord. The defendant has always admitted he was a tenant, and the contention has been as to what were the terms of the tenancy. I should follow the case of Ramchandra Shankar v. Kashinath Narayan (1) and there having been no denial of title before suit and the plaintiff having given notice to quit, the plaintiff on his own showing is not entitled to maintain the present suit to eject the defendant from the lands of which he is now in possession.

The question still remains whether the plaintiff is entitled to a declaration that the defendant is only a cultivator, or yearly tenant. I do not think that he is. It is well established that there can be adverse possession of a limited interest in property as well as of the full title as owner. Consequently as it appears that the defendant agreed to go into possession under rules which would give him a permanent tenancy and that he has ever since he went into possession claimed to be in as a permanent tenant, I am of opinion that since 1881 and 1884 he has been in adverse possession as a permanent tenant and that as the plaintiff has not brought this suit within three years of his attaining majority, the defendant by adverse possession has obtained a right to hold these lands as against the plaintiff as a permanent tenant.

The plaintiff's appeal must therefore be dismissed with costs.

Appeal dismissed.

(1) (1896) P. J. p. 451.

APPELLATE CRIMINAL.

Before the Honourable Mr. E. T. Candy, Acting Chief Justice, and Mr. Justice Chandavarkar.

EMPEROR v. JAMSETJI CAWASJI CAMA.*

A'bkûri Act (Bombay Act V of 1878), sections 3 (9), 62—Medicated article—Intoxicating drug—Cocaine.

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The term "medicated article" as used in section 62 of the Bombay A'bkári Act (Bombay Act V of 1878), applies to something which is manufactured and by that manufacture is imbued with certain medicinal properties. It does not therefore include cocaine, which is a medicine per se.

The word "intoxicating" as used in section 3, clause 9 of the Bombay A'bkári Act (Bombay Act V of 1878), cannot be confined to its derivative meaning, namely, poisonous: the word must be taken to be used in its popular sense, which would include the effects produced by cocaine.

APPEAL under section 417 of the Criminal Procedure Code (Act V of 1898), made by the Government of Bombay, from an order of acquittal recorded by J. Sanders Slater, Chief Presidency Magistrate of Bombay.

The accused, a chemist, was charged with having sold on or about the 27th January, 1903, $\frac{1}{2}$ a dram of cocaine without a license from the Collector of Abkári, in contravention of the provisions of the Abkári Act (Bombay Act V of 1878), an offence punishable under section 43, clause (g) of the Act.

On the 6th February, 1903, the accused was acquitted under section 245 of the Code of Criminal Procedure (V of 1898). The Magistrate in the course of his judgment said:—

From the evidence before the Court it appears that cocaine—as it is commonly called—is a drug of an extremely deleterious character when placed in the hands of inexperienced persons, and one the sale of which with public advantage be placed under stringent restrictive rules. Its effects, when administered in other than medical doses, are highly obnoxious to human life, and when administered in medical doses for a more or less prolonged period create a craving for the drug in increasing doses. The immediate effect of the drug is stimulate the spinal cerebral nerve centres—the stimulation being followed by corresponding depression and ultimately, in the event of continued administration of the drug in increasing doses, by paralysis of these centres and death.

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There can be no doubt upon the evidence that cocaine is a poison, though not so virulent a poison as aconite, digitalis, belladonna, and other vegetable poisons. It is used medicinally, chiefly by subcutaneous injection for producing local anasthesia, in solution, and occasionally by external application, though its effect on unbroken skin is perfectly nil. But in Bombay it appears to be swallowed wrapped up in a pan leaf, and that without medical advice, or for any other purpose than that of enjoying the exhilarating effect which it temporarily produces. It is to check the consumption of the drug in this manner, and not with the object of interfering with its administration by medical men, that this prosecution has been instituted. If cocaine is an intoxicating drug within the meaning of the A'bkári Act, vendors of the drug must be held to be amenable to the provisions of that Act, and therefore the main question which I have to decide is whether cocaine falls within the definition of "intoxicating drug" as laid down in section 3 (9) of the Act, which runs as follows:—

"Intoxicating drug" includes ganja, bháng, charas and every preparation and admixture of the same and every intoxicating drink or substance prepared from hemp, grain or other materials not included in the term "liquor," but does not include opium or anything included within the meaning of that word, as defined in the Indian Opium Act. 1878. It will be noticed that this definition is not an exhaustive one, but includes intoxicating drinks or substance prepared from hemp, grain or other material. In interpreting this enactment, which is a highly penal one, a strict construction must be placed upon the words used, and in case the meaning of any word in this definition is doubtful it must be construed in the manner most favourable to the liberties of the subject. This is a well-known maxim of the law, but I may cite as an authority for its application in Bombay Reg. v. Bhista bin Madana (I. L, R. 1 Bom. 308). What then is the meaning to be attached to the word "intoxicating"? The first meaning of the word "intoxicate," as given in the Century Dictionary, is "to poison"; the second meaning is "to make drunk as with spirituous liquor; inebriate," and a third meaning—a figurative one—is "to excite to a very high pitch of feeling." Which of these meanings is to be attributed to the word as used in the A'bkari Act? I think I am bound to look to the words of the definition to ascertain whether they give any clue to the answer to this question, and on looking to those words I find a distinct clue—the intoxication must be intoxication such as caused by ganja, bhang, charas and other preparations of hemp-that is to say, that "any other material" must, in my opinion, be material "ejusdem generis" as hemp or must produce similar effects. Major Collis-Barry in his evidence states that cocaine is in no way prepared from hemp or grain, and that it does not in any way resemble ganja or bhang. He says it is not ejusdem generis with them. Many references were made to treatises on the subject, inter alia, of cocaine, but in none of them does it appear, so far as they have been brought to the notice of the Court, that the properties or effects of cocaine resemble the properties or effects of ganja, bhang or any other preparations of hemp. The Public Prosecutor argued that opium does not resemble hemp or grain, and that therefore the mention of opium in the section indicated that the material referred

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to need not be material ejusdem generis as those mentioned. This however is entirely of a negative character, as the definition entirely excludes opium and its preparations. It is quite possible, though on that point there is no evidence before the Court, that the intoxication produced by the use of opium may resemble that produced by ganja, etc. Stated shortly, the theory of the prosecution is that "intoxicating" is synonymous with "poisonous" and that therefore cocaine is an intoxicating drug. I cannot however place that technical interpretation upon that word as used here and I hold that the word "intoxicating" must be construed to mean making drunk as with ganja or bhang. The prosecution having failed to show that cocaine is a drug which has such an effect as an ordinary consequence of its consumption, the case fails.

The Government of Bombay appealed to the High Court.

The Advocate General, with the Public Prosecutor, for the appellant.

S. B. Spencer for the accused.

CANDY, ACTING C. J.—It is necessary to put forth the facts which have led to the present prosecution. The case is admittedly a test one, and the main question for our consideration is whether the cocaine which is the subject-matter of the present case comes within the definition of "intoxicating drug" as set forth in section 3, clause (9) of Bombay Act V of 1878.

There were two lines of defence. One is under section 62 which provides:-"Nothing in the foregoing provisions of this Act applies to the manufacture, sale or supply of any bond fide medicated articl e for medicinal purposes by medical practitioners, chemists, druggists, apothecaries or keepers of dispensaries; but it shall be lawful for Government at any time, by notification in the Bombay Government Gazette, to prohibit the sale of any such article within any defined local area or place except under a license from the Collector, which shall be granted on payment of such fees and subject to such conditions as Government may deem fit to prescribe." We are clearly of opinion that the bottle of cocaine which was the subject of this prosecution is not a medicated article within the terms of that section. It appears to us that it is a medicine per se and that the term medicated article must apply to something which is manufactured and by that manufacture is imbued with certain medicinal properties. This appears to us to be a salt of the base cocaine.

Now we turn to the second line of defence, i.e., the ground upon which the learned Chief Presidency Magistrate considered that

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Clause (9) of section 3 runs:—"Intoxicating drug includes ganja, bhang, charas and every preparation and an admixture of the same and every intoxicating drink or substance prepared from hemp, grain or other materials not included in the term liquor but does not include opium."

The learned Chief Presidency Magistrate was of opinion that cocaine did not come within these terms, because he held that the intoxication which must be caused by any intoxicating drug falling within the terms of the section must be such an intoxication as is caused by ganja, bhang, etc., and also that the other material referred to in this section must be *cjusdem generis* with hemp, etc.

We are unable to concur with that opinion. The learned Chief Presidency Magistrate quoted a case in which it was held in accordance with well-known rulings that in construing a penal clause the Court must be very strict. The clause which we are considering is not a penal clause; it is an interpretation clause, and what we have to look at is whether the inclusion of cocaine within the term " intoxicating drug" is within the mischief contemplated by the Act and within the four corners of the definition.

A perusal of the previous legislation on this subject in the Bombay Presidency would seem to show that the mischief aimed at was the vicious use of intoxicating drugs of any description. A reference to the preamble to Regulation XXI of 1827 and to section 10 of Act III of 1852 will show that there was apparently no intention in the mind of the Legislature to limit the provisions of the law to any particular kind of intoxicating drugs. With reference to the inclusion of charas made by Bombay Act V of 1891, it is evident from the perusal of that Act that the object of that legislation was not simply to include charas as an intoxicating drug, but to make the most stringent provisions with regard to both the manufacture and the sale of charas as suggested by the Hemp Drugs Commission. The inclusion, therefore, of charas within the interpretation clause by recent legislation does not assist us.

Coming now to the words of the clause we find that there is some difficulty in ascertaining whether the words "not included

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in the term liquor" apply to the words "drink or substance" or to the words "other material." If it is permissible for us to refer to the words of the corresponding Act in the Madras Presidency in which the word "and" is found before the words "not included in the term liquor," the presumption would be that those words were intended to apply to "drink or substance." In whichever way we regard the clause, we think it is clear that the Legislature did not intend the definition to apply solely to hemp, grain, or other material of the same kind as hemp. It is noticeable that liquor as defined in clause (7) of the same section and opium as defined in the Opium Act are both purposely excluded from the definition of "intoxicating drug." This exclusion would hardly have been necessary had the meaning of the Legislature been that the term in question should apply only to hemp or materials of that nature. In connection with this point it may be well to refer to the judgment of Mr. Justice Quain in the Queen v. Midland Kailway Co.,(1) where he says: - "I start with this proposition that it is a mistake to apply the rule of ejusdem generis at all to the construction of the statute. If the words had been 'houses. buildings and property,' and had stopped there, I agree that the rule would be applicable; but the words are 'houses, buildings and property other than land."

In the same way here, had the words stopped at 'hemp, grain or other material' it is possible that the argument used for the defence would have some force.

In our opinion the word "intoxicating" used in the interpretation clause cannot be confined to its derivative meaning, namely, "poisonous." We think that the word must be taken in its popular sense. That cocaine can have "intoxicating" effects has been amply proved in this case. It is unnecessary to refer to the evidence at any length. It will suffice to mention the paper by a well-known acknowledged authority, Dr. Bose, in which he describes all those intoxicating effects at great length.

For these reasons we think that the cocaine, the subject of this prosecution, is an "intoxicating drug" within the meaning of the Act. We reverse the acquittal recorded by the Magistrate; and we record a conviction under section 43, clause (9) of the A'bkari Act (Bom. Act V of 1878); and as this is a test case we impose merely a nominal fine of Rupee one (1).

(1) (1875) L. R. 10 Q. B. 389 at p. 398.

APPELLATE CIVIL.

Before the Hon'ble Mr. E. T. Candy, C.S.I., Acting Chief Justice, and Mr. Justice Chandavarkar.

1903. June 23, SIDLINGAPPA BIN IRAPPA AND OTHERS (ORIGINAL DEFENDANTS), AFFEL-LANTS, V. SHANKARAPPA BIN KARIBASAPPA AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.**

Civil Procedure Code (Act XIV of 1882), section 273—Decree for dissolution of partnership—Money-decree—Execution of money-decree—Attachment of decree for dissolution of partnership.

Certain creditors of a partnership obtained a money-decree against the firm. In execution of their decree they sought to attach and sell a decree for the dissolution of the firm and for the taking of the accounts of the partners and for the incidental reliefs requisite in such decrees, including the appointment of a receiver and a direction to pay the debts of the firm.

Held, that the decree for dissolution could so far be regarded as a moneydecree and could therefore be attached but not sold. The proper remedy in such cases is by proceedings under section 273 of the Civil Procedure Code.

APPLICATION against an order in an execution proceeding passed by R. R. Gangolli, First Class Subordinate Judge of Dharwar.

Application for the attachment and sale of a decree for dissolution of partnership in execution of a money-decree.

One Shankarappa bin Karibasappa brought a suit, No. 486 of 1894, in the Court of the First Class Subordinate Judge of Dharwar, for the dissolution of a partnership existing between himself and the defendants, (1) Kariyappa bin Chanbasappa Mudhol, (2) Sidlingappa bin Irappa, and (3) Karibasaya bin Mahagundaya. On the 11th June 1897, the Court passed a decree declaring the partnership dissolved as from the 14th January, 1894. The decree contained certain provisions with respect to the dissolution of partnership, of which the following are material for the purpose of this report:—

1. A receiver to be appointed in execution of the decree for the purpose of recovering the outstandings due to and paying the debts and liabilities due by the partnership, for managing and realizing the partnership assets and for all other purposes of the execution of this decree in the manner stated below.

3. The receiver should also take possession of the whole immoveable property belonging to the partnership mentioned in the deed-of-sale, Exhibit 161, and

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other papers bearing on the same and proceed to manage the same by letting it, &c., and credit the proceeds of the same to the account of the partnership, unless the four partners, or any of them, should pay into Court, or to such receiver, the amount of money, being the price of their or his one-fourth share of the said immoveable property as specified by the Commissioner in his statement, Exhibit 157, within six months from the date to be fixed by the Court for this purpose after the appointment of the receiver, in which case the immoveable properties in question should be divided into four equal shares and one share be given to each partner or partners paying the price of his or their respective share. In default of such payment the receiver to proceed as directed in paragraph 10 below.

5. The three partners, that is, the plaintiff and the defendants 1 and 3, should pay into Court the amounts of money due by them respectively as specified in the statements, Exhibits 157 and 158, within a period of not more than six months from the date of the receipt of a notice from the receiver to pay the same and the receiver was directed to credit such payment made by the partners to their respective accounts.

10. If, however, the recoveries made by him as stated above should be found to be insufficient to satisfy all the debts payable by the firm, the receiver to proceed to sell the whole immoveable properties of the partnership at the market price then prevailing or such portions thereof as should still remain in his possession by reason of the non-payment of the price thereof by all or any of the partners in respect of their or his share as provided in paragraph 3 and pay off all the remaining debts out of such proceeds; and if there should be any debts still left unpaid, the amount required for payment and satisfaction thereof to be paid by all the four partners in equal shares, or if any surplus be left, the same to be shared in by all the four partners in equal proportions?

The plaintiff and defendant 1, being dissatisfied with the said decree, preferred cross-appeals, Nos. 110 and 111 of 1837 respectively. The High Court, on the 10th August, 1898, dismissed both the said appeals and confirmed the decree with costs.

While the proceedings in the above suit were pending, one Rachappa bin Karibasappa and his brothers, who were members of an undivided Hindu family and one of whom was Shankarappa, the plaintiff in Suit No. 486 of 1894, brought a suit, No. 31 of 1897, in the Court of the First Class Subordinate Judge of Dhárwár against the partnership firm whose dissolution had been decreed in Suit No. 486 of 1894 for the recovery of a money-debt, namely, Rs. 10,820. Pending the suit, the plaintiff Rachappa died (without leaving any representative) and his name was struck off. The Court passed a decree for the plaintiffs on the 31st July, 1899.

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Subsequently in the year 1902 the plaintiffs in Suit No. 31 of 1897 having applied for execution of the decree by attachment and sale of the decree in Suit No. 486 of 1894 for dissolution of partnership, the defendants-opponents contended that the decree could not be attached according to law, as it was in the hands of an official receiver appointed by the Court as the assets of the dissolved partnership, and further that the previous sanction of the Court was necessary for the attachment of the decree, and as no such sanction was obtained by the applicants, their application for execution should be dismissed. The Court overruled the defendants' contentions and directed that "further orders be made for execution as prayed for by the applicants."

The defendants appealed.

Robertson (with Mahadeo B. Chaubal) for the appellants (defendants):—We first contend that a decree for dissolution and winding up being in the nature of an administration decree is not property that can be attached and sold; much less can it be regarded as an asset of the partnership. Secondly, we contend that although the partnership property consisted of moveables and immoveables, the decree for dissolution, whereby a receiver was appointed to collect the outstandings and pay off the debts and finally to distribute the surplus, if any, between the partners, cannot be regarded as anything more than a mere money-decree and, therefore, even if attachable, the order for the sale of such decree is illegal, section 273 of the Civil Procedure Code: J. Kahn v. Alli Mahomed (1); Mahommed Noorooddeen v. Mahommed Zohuruddeen. (2)

Shamrav Vithal for the respondents (plaintiffs):—A decree for dissolution is nowhere exempted in section 266 of the Civil Procedure Code. Inasmuch as the partnership property consisted of shops and houses, &c., a decree relating to such property cannot be a mere money-decree. In Gopal Nanashet v. Joharimal (3) all decrees which are not mere money-decrees are held to be attachable and saleable property.

CANDY, C. J. (ACTING):—We think that the Subordinate Judge, First Class, was wrong in directing further orders to be made for execution as prayed for by the applicants.

In Suit No. 486 of 1894 a decree was passed for the dissolution of a certain partnership consisting of four partners. The dissolution was declared to date from the 14th January, 1894, and a receiver was appointed with power to collect the assets and pay the debts of the firm which had been dissolved. In that case the decree of the Subordinate Judge, which was confirmed by the High Court, gave elaborate directions to the receiver as to how he was to act. By clause 3 he was to take possession of the whole immoveable property belonging to the partnership, and on any partner paying the price of one-fourth share in the same, he was to deliver such share into the possession of that partner. has not been contended that any partner has paid his share. was further provided by clause 10 of the decree that in default of such payment the receiver was, if he required funds to satisfy all the debts payable by the firm, to proceed to sell the whole immoveable properties and pay off all the remaining debts out of such proceeds. If any surplus was left out of the proceeds, on the payment of all the debts, the same was to be shared by all the four partners in equal proportion.

There was a further clause (No. 5) dealing with certain specified sums which were to be paid by three of the partners to the receiver. One of those partners was Shankarappa, and he was ordered to pay Rs. 4,512-5-7½. It is asserted before us that that money has not been paid. This same Shankarappa with his undivided brothers representing a Hindu family now seeks to execute a decree in a suit brought by Rachappa, the late managing member of the family, for a debt due by the said firm, and they seek to obtain execution by the attachment and sale of the above described decree which had been passed in the suit for dissolution of partnership.

We think, having regard to the principle laid down by Mr. Justice Farran in the case of J. Kahn v. Alli Mahomed Haji Umar, (1) followed in the case of Mahommed Zohuruddeen v. Mahometer v. V. Mahometer v. V. Mahometer v. V. Mahometer v. V.

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SIDLINGAPPA v. SHANKAR-APPA. med Noorooddeen, (1) it is very doubtful whether such an execution can be allowed. An officer of the Court is now executing that decree, and collecting the assets of the late firm and paying the debts of the firm, the decree-holders in the latter suit ranking as creditors of that firm. But it is admitted before us that the decree in the suit for dissolution of partnership can be so far regarded as a money-decree, and that therefore it can be attached but cannot be sold. This being so, it is clear that the applicants' remedy is not by a sale of the decree, but by proceeding under the provisions of section 273 of the Civil Procedure Code: see the case of Gopal v. Joharimal.(2)

We therefore vary the order of the Subordinate Judge, and direct that the procedure laid down in section 273 be followed. The order as to sale will be set aside. Each party to bear his own costs in this Court.

Order varied.

(1) (1893) 21 Cal, 85.

(2) (1891) 16 Bom. 522

APPELLATE CIVIL.

Before the Hon'ble Mr. E. T. Candy, C.S.I., Acting Chief Justice, and Mr. Justice Chandavarkar.

1903. June 24. A SHOP STYLED IN THE NAME OF BAKATRAM NANURAM BY ITS OWNER MINALAL SHADIRAM (OBIGINAL DEFENDANT 1), APPELIANT, v. KHARSETJI JIVAJISHET AND ANOTHER (OBIGINAL PLAINTIFF AND DEFENDANT 2), RESPONDENTS.*

Limitation Act (XV of 1877), schedule II, article 91—Bond—Suit to have the bond adjudged void—Specific Relief Act (I of 1877), section 39—Limitation.

Article 91, schedule II, of the Limitation Act (XV of 1877), applies to a suit brought under section 39 of the Specific Relief Act (I of 1877) to have a bond adjudged void and to have it delivered up and cancelled.

APPEAL from the decision of D. G. Gharpure, First Class Subordinate Judge of Dhulia in the Khandesh District, in Civil Suit No. 412 of 1898.

The plaintiff on the 11th November, 1898, brought the present suit to have an instalment bond dated the 19th June, 1894, passed by him to the defendant firm, set aside on the ground that it was obtained from him by coercion, fraud and misrepresentation, alleging that there was no consideration for it and that, if there was any, it was bad as arising out of wagering transactions. The plaintiff further alleged that he came to know of the defendants' fraud in September, 1896.

The defendants were the proprietors of the defendant firm.

Defendant 1 denied the plaintiff's allegations and contended that the suit was time-barred.

Defendant 2 did not appear.

The Subordinate Judge found that though the fraud, if any, must have come to plaintiff's notice sometime before the 9th November, 1895, the claim was not time-barred on the following ground:—

I am of opinion that the cause of action to set aside a bond cannot be time-barred as long as liability thereunder can be enforced. In any suit of the latter description against plaintiff, he can very well make the defence that the bond is invalid and such a defence will not be open to the objection that a suit for setting the bond aside on that ground is time barred. It is admitted that liability of plaintiff under the bond can still be enforced wherein he can safely plead that the bond is void. If so, his present suit for a similar declaration cannot be time-barred.

The Subordinate Judge, therefore, set aside the bond holding that as it was in respect of satta (wagering) transactions, it was illegal and the consideration therefor was not valid.

Defendant 1 appealed.

Branson (with Narayan V. Gokhale) for the appellant (defendant 1):—The Judge was wrong in holding that because the plaintiff's plea as to the invalidity of the bond would not be open to the bar of limitation in a suit brought against him by us to enforce liability under the bond, therefore we cannot defend the present suit on the ground of limitation under article 91, schedule II, of the Limitation Act. The suit was brought under section 39 of the Specific Relief Act, and article 91 of the Limitation Act governs such a suit. On the facts found, the suit ought to have been dismissed by the Judge.

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BAKATHAM NANURAM v. KHARSETJI. Raikes (with Daji A. Khare) for respondent I (plaintiff):—We contend that article 91 of the Limitation Act does not apply. The suit is governed by article 120 of the Act, therefore the period of limitation is six years and not three. We seek for a declaration that the bond in suit is void, therefore it should be cancelled and delivered back to us. If article 91 be held applicable, still our prayer for a declaration would not be affected. If the larger relief cannot be granted, we submit we are entitled at least to the smaller relief: Rallia Ram v. Sundar (1); Nagathal v. Ponnusami (2).

Branson, in reply:—Where the cancelment or setting aside of an instrument is the only relief asked, article 91 of the Limitation Act applies: Hazari Lal v. Jadaun Singh (3); Uma Shankar v. Kalka Prasad (4); Hasan Ali v. Nazo. (5) Under section 42 of the Specific Relief Act there can be no suit for a mere declaration that an instrument is void: see Mitter on Limitation, page 730. The plaintiff is, therefore, not entitled to a declaration if his present suit under section 39 of the Specific Relief Act is timebarred.

CANDY, C. J. (ACTING):—In this case we need only deal with the question of limitation. The Subordinate Judge held that there was no bar of limitation because if the plaintiff had been sued on the bond, he could raise the pleas which are the foundation of his present suit. There are no authorities for such a proposition, and the learned counsel for the plaintiff before us did not support it. But he contended that though the main prayer of the plaint (that the bond should be set aside) might be barred, still he was entitled to a declaration that the bond was void, and that for such a claim the period of limitation would be six years.

We do not think that this contention is sound. The plaintiff seeks equitable relief under section 39 of the Specific Relief Act, and asks to have the bond adjudged void, and prays that the Court may in its discretion so adjudge it, and order it to be

^{(1) (1893) 18} Punjab Record, 264.

^{(3) (1882) 5} All. 76.

^{(2) (1889) 13} Mad. 44,

^{(4) (1883) 6} All. 75.

^{(5) (1889) 11} All. 456.

delivered up and cancelled. That was his prayer upon which the parties went to trial.

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To such a case, we think, article 91 of the Limitation Act, schedule II, applies. This is not a document which is said on the face of it to be void; it can only be adjudged void if the facts which the plaintiff asserts can be proved.

For these reasons we think that the Subordinate Judge should have dismissed the claim with costs, and we accordingly now do so.

In giving our decision on this point we, of course, must not be taken as expressing any opinion on the other points which were decided by the Subordinate Judge, nor as to the question how far the plaintiff can raise the pleas which he did in this case in a suit brought on the bond.

Decree reversed.

APPELLATE CIVIL.

Before the Hon'ble Mr. E. T. Candy, C.S.I., Acting Chief Justice, and Mr. Justice Chandavarkar.

BEHRAM KAIKHUSHRU IRANI (ORIGINAL DEFENDANT), APPLICANT, v. ARDESHIR KAVASJI (ORIGINAL PLAINTIFF), OPPONENT.*

1903. July 7.

Small Cause Court—Presidency Small Cause Courts Act (XV of 1882), sections 9 and 38—Decision by a single Judge on evidence—Reversal of decree by Full Court—Jurisdiction—Practice.

One of the Judges of the Presidency Small Cause Court at Bombay having dismissed the plaintiff's suit on the evidence, the decree of the Judge was reversed by the Full Court (composed of two Judges) as being manifestly against the weight of the evidence, on an application by the plaintiff under section 38 of the Presidency Small Cause Courts Act (XV of 1882).

A question arose as to whether the decision of the Full Court was ultra vires and void, there being nothing in the rules framed under section 9 of the Act providing for the exercise by the Full Court composed of two or more Judges of any powers conferred on the Small Cause Courts.

Held, that though the Rules of procedure and practice of the Presidency Small Cause Court at Bombay were silent as to the exercise by the Full Court consisting of more than one Judge of any powers under the Act, it did not

^{*} Application No. 77 of 1903 under Extraordinary jurisdiction.

BEHRAM v. Ardeshib. follow that the sittings of the Full Court were therefore ultra vires. Though no rules were framed as to the procedure to be followed, still by long practice the procedure had become well-defined and fully known, the practice being that the Full Court should consist of two Judges—the Chief Judge, and in his absence the senior Judge, presiding. The Judge against whose decree any application is made is generally the second member, if he is present in Court. If he is absent, the Chief Judge and the second, or the Chief and any other Judge hear and dispose of the application. Such being the unwritten rul-s of practice, they must be deemed to be "Rules treated as in force in the Court on 31st December, 1894," under clause (2), section 9 of the Act, and to be validly in force. They fall within the principle that an inveterate practice amounts to a rule of law.

Held, further, that the power to alter, set aside or to reverse the decree under section 38 of the Act includes the power of the Full Court to pass a decree in favour of the party in whose favour the application is granted.

The practice of the Court of Small Causes at Bombay of reviewing the decree in cases in which the notes of evidence are sufficient to enable the Full Court to undertake that review and of setting aside a wrongful dismissal of the suit where the decision is mainfestly against the weight of evidence is not contrary to law.

APPLICATION under the Extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882), to set aside the proceedings and decision of the Full Court, consisting of Mr. R. M. Patell, Acting Chief Judge, and Mr. Young, Acting Second Judge, of the Presidency Small Cause Court, Bombay, reversing the decree of Mr. G. D. Deshmukh, Acting Fifth Judge.

The plaintiff sued the defendant in the Presidency Small Cause Court at Bombay to recover Rs. 250 on account of brokerage at 5 per cent., alleged to be due by the defendant for the sale of his hotel at Thana.

The defendant denied liability to the plaintiff's claim contending that the sale of his hotel was not effected through plaintiff.

The suit was tried by Mr. G. D. Deshmukh, Acting Fifth Judge, who, after recording evidence in full, dismissed the claim on the 22nd December, 1902.

The plaintiff thereupon applied to the Full Court under section 38 of the Presidency Small Cause Courts Act (XV of 1882) for an extension of time to move against the decree of Mr. Deshmukh. The application was granted by the Full Court composed of Mr. Chitty, Chief Judge, and Mr. Deshmukh. Before the date of

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the further hearing Mr. Deshmukh ceased to be a Judge of the Presidency Small Cause Court, he having in the meanwhile reverted to his substantial appointment as a Subordinate Judge in the mofussil, and the plaintiff's application against his decree was heard by the Full Court composed of Mr. Chitty, Chief Judge, and Mr. R. M. Patell, Second Judge. The Full Court issued a rule nisi in the following terms:—

On the application of Mr. Dhanjishah Dorabji, counsel for the plaintiff, it is ordered that unless good and sufficient cause to the contrary be shown by the defendant on Tuesday the 17th day of February, 1903, at 11 o'clock in the forenoon, the verdict herein be set aside and the suit re-tried on the ground that the verdict herein was against the weight of evidence.

Mr. Chitty having in the meanwhile left Bombay, the rule was argued before the Full Court composed of Mr. R. M. Patell, Acting Chief Judge, and Mr. Young, Acting Second Judge. At the hearing the defendant contended that the Full Court had no jurisdiction to set aside the decree based on evidence heard and recorded by Mr. Deshmukh, who did not sit in the Full Court. The Court overruled the defendant's contention and without ordering a re-trial made the rule absolute by reversing the decree of Mr. Deshmukh. The plaintiff's claim was allowed to the extent of one hundred rupees with costs.

Being dissatisfied with the decree of the Full Court, the defendant preferred an application to the High Court under the Extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882), urging that:—

- (1) The Full Court consisting of Mr. Chitty, Chief Judge, and Mr. Patell, Second Judge, acted without jurisdiction in granting a rule nisi.
- (2) Mr. Deshmukh, who heard the suit and recorded the evidence, was not sitting with the Chief Judge when the rule was granted.
- (3) The Full Court consisting of Mr. Patell, Acting First Judge, and Mr. Young, Acting Second Judge, had no jurisdiction in making the rule absolute.
- (4) The said two Judges acted without jurisdiction in passing a decree against the applicant (defendant) for Rs. 100 and costs without ordering a re-trial, if they had at all any jurisdiction to do so.
- (5) The said Judges acted without jurisdiction in reversing the decree of Mr. Deshmukh without his consent.
- (6) The said Judges acted without jurisdiction in passing a decree on evidence not recorded by them or any one of them.

- (7) The Judges acted without jurisdiction in passing a decree in contravention of the terms of section 37 of the Presidency Small Cause Courts Act (XV of 1882) under which it was provided that "every decree of the Small Cause Court in a suit shall be final and conclusive."
- (8) The Judges acted without jurisdiction in reversing the decree of Mr. Deshmukh, who did not sit to review his own judgment, on the ground that the decree of the absent Judge was "against the weight of evidence."
- (9) The Judges acted without jurisdiction in sitting as the Full Court not recognized either by the Presidency Small Cause Courts Act, or under any of the rules framed by the High Court of Bombay under section 9 of the Act.

A rule nisi was issued requiring the plaintiff to show cause why the decree passed by the Full Court in his favour should not be set aside.

Marzban (with P. N. Godinho) appeared for the applicant (defendant) in support of the rule :- Our first contention is that there being no rule constituting a Full Court, the definition of Small Cause Court given in section 4 of the Presidency Small Cause Courts Act would mean one Judge or all the five Judges sitting together, but there is no provision for two Judges constituting a Full Court. The Bombay High Court has not framed any rule for the constitution of a Full Court under section 9 of the Act. The High Courts at Calcutta and Madras have framed rules with respect to a Full Court—Rule 95 of the Calcutta Rules and Rules 180 and 181 of Madras Rules. Even under the old Act (IX of 1850) there was no provision made in connection with a Full Court. Sections 37 and 38 of the present Act relate to reviews, but they say nothing with respect to a Full Court. There being no provision of law constituting a Full Court, we submit that the constitution of the Full Court of the Court of Small Causes, Bombay, is illegal.

(CANDY, C. J. (ACTING):—Have you got any authority to support your contention?)

There is no authority because this is the first time that the point is urged. Even supposing that the constitution of the Full Court is legal, still the procedure adopted by that Court was highly irregular. According to the usual practice, the Judge who records evidence and decides the original suit sits with the Chief Judge in the Full Court and then the two Judges decide the application. In the present case Mr. Deshmukh, who

recorded the evidence and decided the suit, was not sitting in the Full Court when the decree was reversed. Another irregularity was that the rule nisi issued to us by the Full Court distinctly stated that the case would be re-tried. But instead of complying with the terms of the rule, the Full Court reversed the decree of Mr. Deshmukh and passed a new decree then and there. We submit that the Full Court had no jurisdiction to do so, especially as Mr. Deshmukh's decree was based entirely on evidence: Srinivasa v. Balaji Rau (1); Sadasook v. Kannayya (2); Sassoon v. Hurry Das. (3)

Our next point is that the Bombay Small Causes Court not having been invested with appellate jurisdiction, the Full Court had no authority to reverse the decree passed by Mr. Deshmukh. The utmost that the Full Court could do in its revisional jurisdiction was to reverse the decree and send back the case for re-trial. The decree being based entirely on evidence, the Full Court had no authority to pass a fresh decree in its place. Even the High Court has no power under its extraordinary jurisdiction to revise a decree of the Small Cause Court when the decree is based purely on facts. Section 25 of the Provincial Small Cause Courts Act supports our contention: Poona City Municipality v. Ramji (4); Bai Jasoda v. Bamansha. (5)

H. C. Coyaji appeared for the opponent (plaintiff) to show cause.

CANDY, C. J. (ACTING):—This is an application under section 622, Civil Procedure Code, by the defendant in a suit in the Court of Small Causes, Bombay, to set aside a decree passed against him by two learned Judges of that Court under section 38 of the Presidency Small Cause Courts Act. The suit was originally decided on 22nd December, 1902, by the Acting Fifth Judge, Mr. Deshmukh, who dismissed the claim.

Plaintiff then made an application to the Chief Judge and Mr. Deshmukh under section 38.

Such applications in the Bombay Court of Small Causes are (it is said) made orally.

^{(1) (1896) 21} Mad. 232.

^{(1030) 21} made 2024

^{(2) (1895) 19} Mad. 96.

^{(3) (1896) 24} Cal. 455. (4) (1895) 21 Bom. 250.

^{(5) (1898) 28} Bom. 334.

Behram v. Ardeshir, On the first day the application was to obtain an extension of time, which was granted. On the next day when the application was renewed Mr. Deshmukh had ceased to be a Judge of the Small Cause Court, and the application was heard by the Chief and Second Judges. Notice was then ordered to issue to defendant.

The case eventually was heard by the Acting Chief and Second Judges (Messrs. R. Patell and Young), who, on the evidence recorded by the late Acting Fifth Judge, set aside his decree dismissing the suit and passed a decree for the plaintiff.

The nine objections recited in the application for revision are all based on the plea of want of jurisdiction and were formulated by the learned counsel for applicant under two main heads:—

- (1) As there is nothing in the present Rules under section 9 of the Presidency Small Cause Courts Act, 1882, for the Court of Small Causes of Bombay providing for the exercise by two or more Judges of any powers conferred on the Small Cause Court, all applications under section 38 of the Act decided by a "Full Court" are ultra vires and void.
- (2) In this case the "Full Court" had no jurisdiction to reverse the decision of the late Acting Fifth Judge on a question of fact.

On point (1) we are of opinion that the fact as stated does not render the proceedings of the Full Court invalid. Section 9 provides that the High Court may from time to time by rules having the force of law prescribe the procedure to be followed and the practice to be observed by the Small Cause Court, &c., and Rules made under this section may provide among other matters for the exercise by one or more of the Judges of the Small Cause Court of any powers conferred on the Small Cause Court by the Act. The Rules of procedure and practice of the Court of Small Causes of Bombay, to be found at page 400 of the Local Rules and orders made under Enactments applying to Bombay, are silent as to the exercise by more than one of the Judges (commonly called "the Full Court") of any powers under the Act. But it does not follow that the sittings of the Full Court are therefore ultra vires. In the report in this case made by the Acting Chief Judge it is stated that the Full Court has been

constituted, and has been working as a Court of Revision and Appeal ever since the establishment of the Court under Act IX of 1850.

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No rules were framed as to the procedure to be followed, but by long practice the procedure has become well-defined and fully known. That practice is that the Full Court consists of two Judges—the Chief Judge, or in his absence the senior Judge, presiding. The Judge against whose decree any application is made is generally the second member, if he is present in Court. If he is absent the Chief Judge, and the second, or the Chief Judge and any other Judge, hear and dispose of the application.

Such apparently are the unwritten Rules of practice, and if they are not inconsistent with the provisions of the Act, they must be deemed to be "Rules treated as in force in the Court on 31st December, 1894," under clause (2) of section 9 of the Act, and to be validly in force. They fall within the principle that "an inveterate practice amounts to a rule of law" (see per Esher M. R. in Joyner v. Weeks. (1)) All the more so as in numbers of cases, this Court has under its Extraordinary jurisdiction acquiesced in the practice. They are in accordance with Rule 95 of the Calcutta Rules and with Rule 180 of the Madras Rules, copies of which have been shown to us by the learned counsel for the present applicant.

Here the pleader for the applicant for a new trial did first move before the Chief Judge and the Acting Judge who had tried the suit; but the merits of the application were not gone into, a postponement being asked for and granted. The Judges were within their rights in granting the postponement. When the application was admitted and finally heard Mr. Deshmukh was not a Judge of the Court, so it was impossible for him to take part in the case.

(2) Under the second head the questions which arise are more difficult.

The first is that the notice (commonly called a *rule nisi*) which was issued was a notice of a new trial, and therefore if the rule was made absolute, all that could be done was to order a new trial.

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We think that the foundation of this argument is more in form than in substance. It has not been shown by affidavit or otherwise that the pleader who appeared for defendant before the Full Court when the case was finally disposed of was not prepared to argue the case on the merits or had no opportunity of doing so. It appears that all applications under section 38 of Act XX of 1882 are treated as applications for new trials. The marginal note to section 38 is "new trial of contested cases."

Rules 178 to 181 of the Madras Rules, promulgated in 1899, shown to us by the learned counsel, illustrate this point. They speak of applications under section 38 as "applications for new trial." Rule 181 runs:—

"If the Court . . . considers that there are grounds for the application it shall grant a *rule nisi* for a new trial, and shall give notice to the other side."

The fact is that the language is apparently based on the old Law. Under section 54 of Act IX of 1850 the Court was merely empowered to order a new trial. Under section 37 of Act XV of 1882, unamended by Act I of 1895, the Court may "order a new trial to be held, or alter, set aside, or reverse the decree or order." The same language is found in section 38 of the present Act. But the applications are treated generically as applications for new trial. Hence the phraseology of the Madras Rules and of the notice in the present case.

But it is contended that, apart from the words of the notice, the Court had no power to set aside the decree of the Acting Fifth Judge, dismissing the suit, and to pass a decree for the plaintiff, basing that decree-solely upon a finding of fact. Apart from the question of the jurisdiction of the Full Court to appreciate the evidence and arrive at a finding of fact opposed to that arrived at by the Judge in the first instance, we think that the power to alter, set aside, or reverse the decree or order must include the power to pass a decree in favour of the party in whose favour the application is granted. It is easy to suppose a case in which after the evidence has been recorded there is no contest regarding the facts, but the single Judge misapplying the law to those facts may have wrongly dismissed the suit. If the Full Court could set aside that decision, it follows that the Full Court

would naturally pass a decree in favour of the plaintiff, in whole or in part as the case may be. It would be unnecessary to order a new trial in order that a fresh finding on the facts might be arrived at, those facts not being contested.

But, it is contended, the Full Court had no jurisdiction to appreciate the evidence, and for this contention there is the clear authority of Collins, C. J., and Shephard, J., in Sadasook Gambir v. Kannayya.⁽¹⁾

That was a case under section 37 of Act XV of 1882, before the amendments under Act I of 1895. The Full Court discussed the evidence and dealt with the case precisely in the manner in which an Appellate Court might have treated it; and the result was they reversed the decree of the single Judge awarding the claim, and they dismissed the suit (the converse of the present case). Mr. Justice Shephard held that this was beyond the jurisdiction of the Full Court. He relied on the provisions of section 38 of the Act, as it then stood, which provided for a rehearing by the High Court in cases of miscarriage or failure of justice. He remarked "that the Act of 1850, section 53" (50 is a misprint), "did not provide for any other mode of interference with the original decree than by granting a new trial, and when in 1882 the Legislature altered the law by prescribing several modes of interference, it clearly was not intended to alter the conditions under which the Full Court could act. If under the Act of 1850 a new trial could not have been granted, then under the Act of 1882 the decree ought not to have been reversed." Mr. Justice Shephard then referred to the English cases as showing that an applicant for a new trial must show that the verdict is one to which no reasonable man ought to have come, and remarked:-"It does not appear that in the present case there was any pretence for saying that the judgment of the Second Judge was in this sense an erroneous one.......It is clear that the case was one in which different minds might not unreasonably have come to different conclusions."

In the case before us we understand the report of the Acting Chief Judge, who was a member of the Court which granted the rule and also of the Court which disposed of the case, as BEHBAM

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meaning that in the opinion of the Full Court the verdict of the late Acting Fifth Judge was manifestly against the weight of the evidence.

Mr. Justice Best did not agree with Mr. Justice Shephard. He held that the language of section 37 (now section 38) seems to mean that though the party is not entitled to appeal as of right, the Court may, if it thinks fit, reconsider any decree or order with all the powers of an ordinary Appellate Court.

The Judges having differed, the case came on, but was not reargued, before the Chief Justice, Sir Arthur Collins, who simply recorded his agreement with the reasons and conclusions of Mr. Justice Shephard.

The question was again considered by a Full Bench of the Madras High Court in *Srinivasa Charlu* v. *Balaji Rau* (1) when it was held that the effect of the amending Act I of 1895 was not to extend the powers of revision given by section 38, but to limit them to contested cases.

The Full Bench therefore adhered to the ruling in the former case that the Full Court had no power to revise a decree of a single Judge or order a new trial on questions of fact. It is noticeable that their Lorships did not allude to one important fact, viz., that the provisions of the old section 38, providing for a rehearing by the High Court in cases of miscarriage or failure of justice, were repealed by Act I of 1895, which enacted an entirely new Chapter VI, and changed the title from "New trials and rehearing" to "New trials and appeals." The fact that suits could be removed before hearing into the High Court (sections 39, 40) would not justify the term "appeal." If then "save as otherwise provided by this Chapter or by any other Enactment for the time being in force every decree or order of the Small Cause Court in a suit shall be final and conclusive," the jurisdiction conferred by section 38 was evidently contemplated as at least quasi-appellate, and there is some force in Mr. Justice Best's remark that the Full Court was apparently vested with all the powers of an ordinary Appellate Court. The ruling of the Madras High Court (Sadasook Gambir v. Kannayya (21), was

quoted with approval by Mr. Justice Sale in Sassoon v. Hurry Das Bhuhut. (1) He held that "where the question is one of evidence the judgment of the original Court could be reversed, and a new trial directed, only when such judgment is manifestly against the weight of the evidence"; and, quoting MacEwen's Small Cause Court Practice, said "it would appear that it has not been the practice of the Small Couse Court to deal with applications for a new trial except under the powers ordinarily exercised by a Revisional Court."

If the above dictum be applied to the present case, it would appear that the Full Court could interfere, as it was held that the decree dismissing the suit was manifestly against the weight of the evidence.

The three cases cited above were quoted by Mr. Justice Strachey in Soonderlal v. Goorprasad (2) as showing that the jurisdiction under section 38 is revisional. So, no doubt, it is; but, as shown above, that does not directly touch the question here, which is whether in revising a decision on a question of fact, because it was manifestly against the weight of the evidence, the Full Court exceeded its revisional jurisdiction.

The learned counsel asked us to apply the analogy of section 25 of the Provincial Small Cause Court Act, and referred us to the dictum of the late Sir Charles Farran in Poona City Municipality v. Ramji (3) where the late learned Chief Justice said:-"It is, we think, clear that an error of law or procedure in the Small Cause Court confers jurisdiction upon the High Court to exercise the power committed to it by the section (25)." This was taken by Mr. Justice Fox in Sookramanian Chetty v. Coath (4) as meaning that "error or misapprehension of the facts of a case, on the part of a Judge of a Small Cause Court, would not give jurisdiction to a High Court to interfere." If that is so under section 25 of the Provincial Small Cause Courts Act (by which the High Court may "pass such order as it thinks fit)", it is argued that it must be more so with regard to the powers of the Full Court under section 38 of the Presidency Small Cause Courts Act. But that does not strictly follow. The words of

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^{(1) (1896) 24} Cal. 455.

^{(2) (1898) 23} Bom. 414.

^{(3, (1895) 21} Bom. 250.

^{(4) (1901) 7 .} urma L. R. 15.

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The judgment of Sir Charles Farran, just cited, was quoted by Mr. Justice Fulton in his judgment in Bai Jasoda v. Bamansha (1) in which the Judge of the Small Cause Court at Broach recorded all the evidence which the plaintiff had produced, and then recorded the following judgment:-"Claim not proved. Claim rejected with costs." The Judges (Sir Charles Farran and Mr. Justice Fulton) held that this was not "according to law," and then on the evidence passed a decree for the plaintiff. Mr. Justice Fulton remarked that it was unnecessary to determine whether the phrase "according to law" could by any ingenuity of reasoning, in an extreme case, be held sufficiently elastic to include a clearly erroneous decision of facts. point is that the Judges, holding that the judgment was not according to law, reviewed the evidence as to the facts, and then considered it unnecessary to order a new trial, but proceeded to give judgment on the facts.

Here, under section 38 of the Presidency Small Cause Courts Act, the Full Court is empowered to "order a new trial or alter, set aside, or reverse the decree." There is nothing to show that the Legislature intended that if a decree dismissing the plaintiff's claim on the facts is set aside, then the Full Court must order a new trial, or that the Full Court is debarred from going into facts at all, even before ordering a new trial.

Whether the jurisdiction of the Full Court under section 38 be termed revisional, or, following the heading of the Chapter, appellate, we do not feel justified in holding that the practice in the Court of Small Causes, Bombay, of reviewing the evidence in cases in which the notes of the evidence are sufficient to enable the Full Court to undertake that review, and of setting aside

a wrongful dismissal of the suit, where the decision is manifestly against the weight of the evidence, is contrary to law; and we therefore discharge this rule with costs.

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Rule discharged.

APPELLATE CIVIL.

Before the Hon'ble Mr. E. T. Candy, C.S.I., Acting Chief Justice, and Mr. Justice Chandavarkar.

ABDUL KARIM FATEH MAHOMED (ORIGINAL PLAINTIFF), APPLICANT, v. THE MUNICIPAL OFFICER, ADEN (ORIGINAL DEFENDANT), OPPONENT.*

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Letters Patent, 1865, clause 13—Aden Courts Act (II of 1864)—Suit in Civil Court of Resident at Aden—Transfer of suit to the High Court—Power of High Court—Jurisdiction.

The Civil Court of the Resident at Aden, as constituted by Act II of 1864, is subject to the superintendence of the High Court at Bombay within the meaning of clause 13 of the Letters Patent, dated the 28th December, 1865, and the High Court has power to remove a suit from the Court of the Resident and to try and determine the same.

CIVIL APPLICATION for the transfer of a suit from the Court of the Political Resident at Aden to the High Court.

The plaintiff filed a suit in the Court of the Political Resident at Aden, alleging that the defendant wrongfully took possession of certain immoveable property, and praying that he (defendant) should be directed to deliver possession of the property to the plaintiff.

The defendant answered (inter alia) that in taking possession of the property he acted under the orders of the Political Resident and that if the plaintiff had any claim he should prefer it against that officer.

The plaintiff, thereupon, applied to the High Court for the transfer of the case from the Court of the Political Resident to

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itself on the ground that under the circumstances of the case it was impossible for the Political Resident to try the suit, and that in the interests of justice the transfer had become necessary. A rule nisi having been issued to the defendant requiring him to show cause why the plaintiff's application should not be granted,

Raikes (instructed by Messrs. Edgelow, Gulabchand and Wadia) appeared for the applicant (plaintiff) in support of the rule :- The question is whether the Resident's Court at Aden is subject to the superintendence of this Court under section 13 of the Letters Patent, dated 28th December, 1865. The Court at Aden was established by the Aden Courts Act (II of 1864). The object of the Act was to bring the Court of the Resident at Aden under the superintendence of this Court in respect of certain judgments and proceedings as stated in the preamble. Sections 8 and 9 of the Act show in respect of what judgments and proceedings the High Court is invested with the power of superintendence. In respect of suits over Rs. 1,000 in value, the Aden Court is bound to make a reference to the High Court for decision. The value of the property in the present suit is over Rs. 1,000. Section 11 lays down the procedure to be adopted by the High Court. These sections clearly make the Court at Aden subject to the superintendence of the High Court. Section 16 of the Act also supports our contention, because under that section the provisions of the Civil Procedure Code are made applicable to the Court at Aden. Under these circumstances, section 25 of the Code would empower this Court to transfer the case to itself. The only authority on the point by way of analogy is the Perim case, Queen-Empress v. Maganlal.(1) Section 31 of the Act gives power to the High Court to frame rules to regulate the practice and proceedings of the Court of the Resident at Aden. This means that that Court is subject to the superintendence of the High Court. Section 15 of the Charter establishing the High Court gives generally to the Appellate side of the High Court the power of revision over all Courts: Bai Jamna v. Bai Jadav.(2)

(CANDY, C. J. (ACTING), referred to Mahadaji v. Sonu.(1))

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Scott (Advocate General, with E. F. Nicholson, Government Solicitor), appeared for the opponent (defendant) to show cause. The High Court's power of superintendence must be determined by reference to the Charter, 24 and 25 Vict., c. 104, section 15: Khoja Shivji v. Hasham Gulam.(2) The Zanzibar Courts are much more under the superintendence of the High Court than the Resident's Court at Aden, because there is an appeal to the High Court from the decision of the Zanzibar Courts; the High Court having appellate jurisdiction the power of revision necessarily follows. The power of superintendence given to the High Court by section 8 of the Aden Courts Act is in connection with criminal cases and not in connection with civil cases. The superintendence or revision provided in the preamble to the Act is the superintendence or revision in criminal cases—see sections 28, 29 and 30 of the Act. The general scope of the Act is that the High Court is merely to give its opinion on a reference by the Aden Court, that is, the High Court's power is merely ministerial with respect to that Court. After the High Court has given its opinion, the final decree is to be passed by the Resident according to the opinion of the High Court. Though the Act provides for the procedure to be adopted by the Resident in criminal cases, it says nothing about the procedure to be adopted by him in civil cases. In such cases the Resident is to be governed by the spirit and principles of the laws prevailing in the Bombay Presidency—see section 15 of the Act. Under section 8 there being no appeal given against the decision of the Resident, the result would be that the High Court cannot transfer the present case from the Court at Aden: In Re Rattansee Purshottum.(3)

Raikes, in reply:—The cases relied on do not apply. In the absence of any enactment to the contrary, all Courts in this Presidency must, ipso facto, be subordinate to this High Court: Hari v. The Secretary of State. (4) Aden being included in the Presidency of Bombay, the Court at Aden must necessarily be

^{(1) (1872) 9} Bom. H. C. R. 249.

^{(2) (1895) 20} Bom. 480.

^{(3) (1899) 24} Boin. 471.

^{(4) (1903) 27} Bom. 424.

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subject, under the Letters Patent and the Charter Act, to the superintendence of the Bombay High Court. The High Court is not merely a consultative tribunal—see sections 8 and 9 of the Act. The High Court is to pass its decision and the Resident is to carry it out. The Resident is to discharge the duties of the Court executing a decree, in other words, he becomes the ministerial officer of the High Court.

CANDY, C. J. (ACTING).—The main question before us is whether the Civil Court of the Resident at Aden, as constituted by Act II of 1864, is subject to the superintendence of the High Court of Bombay within the meaning of clause 13 of the Letters Patent, dated 28th December, 1865. If it is, then the High Court has power to remove the present suit from the Court of the Resident and to try and determine that suit, and it is clear on the admitted facts that for the purposes of justice it is proper that this should be done if the High Court has that power. Pirbhai v. B. B. and C. I. Railway Co. (1) Mr. Justice Green held that the Bombay Court of Small Causes, as constituted under Act IX of 1850 (amended by Act XXVI of 1864, section 7). must be considered to be subject to the superintendence of the High Court for the following reasons:—Subject to the conditions prescribed in section 54 of Act IX of 1850, the High Court had authority under that section to remove causes from the Small Cause Court and itself to try and determine them. By section 41 of the same Act, any general rules for regulating the practice and proceedings of the Small Cause Court made and issued by the Judges of that Court were to be sent to the High Court for approval . . . Then there was the power of the High Court: to prohibit the Bombay Court of Small Causes from proceeding where it was acting without jurisdiction or in excess of jurisdiction. . . and there was the power of reserving questions of law or equity for the opinion of the High Court, and the obligation to do so in cases above the value of Rs. 500, on the application of either of the parties. Such a power of reference was termed by Mr. Justice Phear in the matter of John Thomson (2) a "modified form of appeal."

For the above reasons Mr. Justice Green held that the Bombay Court of Small Causes, though not subject in all respects.

^{(1) (1871) 8} Born. H. C. 59 (O. C.)

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or perhaps generally, to the superintendence of the High Court, nor, strictly speaking, subject to its appellate jurisdiction at all, was so far subject to its superintendence as to give the latter Court, under clause 13 of the Letters Patent, power to remove, and try and determine any suit pending in the former Court, when the High Court for purposes of justice should think proper to do so.

The learned Advocate-General, who appeared before us against the rule, referred to section 6 of the present Presidency Small Cause Courts Act (XV of 1882) as showing that the Legislature deemed it necessary by special enactment to declare the Small Cause Court subject to the superintendence of the High Court within the meaning of the Letters Patent. But this may well have been for the sake of greater caution, and it is quite possible that the Legislature in framing the Presidency Small Cause Courts Act of 1882 had in mind the decision of Mr. Justice Green, which was delivered in 1871. For instance, section 6 of Act XV of 1882 declares that the High Court shall have, in respect of the Small Cause Court, the same powers as it has under the Charter Act in respect of Courts subject to its appellate jurisdiction; and these powers include the power to make and issue general rules for regulating the practice and proceedings, the same power being given by section 9 of the Act.

Act II of 1864 was passed after the Charter Act of 1861 and after the original Letters Patent of 1862. Not only is it stated in the preamble of Act II of 1864 that it is expedient to provide for the superintendence or revision of certain of the judgments and proceedings of the Resident at Aden by the High Court at Bombay, but the Act provides in section 31 that the High Court of Bombay shall have power to make and issue general rules for regulating the practice and proceedings of the Court of the Resident, and also to frame forms, &c., all almost in the same language as is to be found in section 15 of the Charter Act. It would seem therefore that the Legislature expressly intended that the High Court of Bombay should have superintendence over the Court of the Resident. No doubt the High Court of Bombay is not the "High Court" at Aden for such purposes as are governed by the definition of the High Court in the General Clauses Act:

ABDUL KARIM V MUNICIPAL OFFICER, ADEN. for it is not the highest Court of appeal. There is no appeal from decisions or orders, civil or criminal, of the Resident (sections 3 and 29 of Act II of 1864). But nevertheless the High Court may have superintendence over the Resident's Court; and it is clear from sections 8 to 13 of the Act II of 1864 that in certain cases a litigant in the Resident's Court has of right what is practically an appeal to the High Court. Mr. Scott would have us read clause 13 of the Letters Patent and section 15 of the Charter Act, together so strictly that the High Court can have no superintendence over a Court, unless an appeal properly so called lies from the decisions of such Court to the High Court. But that, as remarked by the present Chief Justice (in Bhagwandas v. Jedu, (1)) would be to apply a narrow meaning not warranted by the Act.

For these reasons I think that this Court has jurisdiction under clause 13 of the Letters Patent; and I would make the rule absolute. Costs to abide the result.

CHANDAVARKAR, J.—This is an application made by Abdul Karim Fatch Mahomed under section 13 of the Amended Letters Patent of 1865 for a transfer to this Court of the suit filed by the applicant in the Resident's Court at Aden against the opponent, the Municipal Officer at Aden. The ground of the application is that the opponent has in his written statement in the suit sought to justify the act complained of in the plaint as one done under the orders of the Resident.

The application is opposed by the learned Advocate-General, appearing for the opponent, on two grounds: first, that the Resident's Court is not subject to the superintendence of this Court within the meaning of section 13 of the Amended Letters Patent of 1865, and second, that on the merits this is not a proper case for transfer.

Dealing first with the preliminary objection to the jurisdiction of this Court, it is clear from the preamble of Act No. II of 1864 (An Act to provide for the administration of civil and criminal justice at Aden) that one of the objects with which it was passed was "to provide for the superintendence or revision of certain" of the judgments and proceedings of the Resident's Court by this Court. It is contended, however, that the power of superin-

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tendence given by the Act to this Court is not a judicial but a purely ministerial power. It is true that according to section 8 of the Act no appeal lies to this Court from any decision or order of the Resident; but the power given to this Court to hear and pass judgments in certain cases mentioned in the said section when those cases are referred to this Court as prescribed thereby is undoubtedly a judicial, not a purely ministerial, power. According to section 8, in the trial of any suit in which the claim shall not exceed one thousand rupees in value, the Resident may, either of his own motion or on the application of any of the parties, refer to this Court any question of law, or of usage having the force of law, or of the construction of a document affecting the merits of the decision, when he entertains reasonable doubt on the question. In the trial of any suit in which the claim exceeds one thousand rupees in value, the Resident of his own motion may, and, on the application of any of the parties, shall refer "for the decision" of this Court any question of fact or of law, or of usage having the force of law, or of the construction of a document affecting the merits of the decision. Cases so referred to this Court have to be heard, under section 9 by two or more Judges and this Court has to give "Judgment in every case. Under section 11, the parties to the case are entitled to appear and be heard in this Court in person or by a pleader. According to section 12, "the High Court, when it has heard and considered the case, shall transmit to the Resident a copy of its judgment under the seal of the Court and the signature of the Registrar." The combined effect of all these sections is that when this Court acts on a reference by the Resident, it acts as a Court superintending judicially certain judgments and proceedings of the Resident. It is true that this Court cannot of itself under the Act pass a decree in any case referred to it; the duty of disposing of the case is cast by section 12 of the Act on the Resident; but, according to that section, the Resident has to dispose of the case "conformably to the decision of the High Court." It is this Court which in effect decides the case; it is the tribunal which gives judgment and, according to section 9, that judgment is an order of the Court.

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But it was urged that in any case the Resident's Court was not within the meaning of section 13 of the Amended Letters Patent of 1865, because, it was argued, a Court subject to this Court's "superintendence" must be a Court, subject, according to section 15 of the Charter Act, to the appellate jurisdiction of this Court. Section 13 of the Letters Patent ordains :- "That the said High Court of Judicature at Bombay shall have power to remove, and to try and determine as a Court of Extraordinary Original Jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Presidency of Bombay, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court." Section 15 of the Charter Act enacts that "each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction." The contention of the learned Advocate-General before us is that section 13 of the Letters Patent must be read with section 15 of the Charter Act. and a Court contemplated as subject to this Court's superintendence in the former is a Court subject to this Court's appellate jurisdiction as pointed out in the latter, and no other. The difficulty of accepting that view is that the Letters Patent of 1865 were granted, as the preamble shows, for the express purpose of conferring additional powers on this Court. Section 15 of the Charter Act dealt with Courts which might be subject to the appellate jurisdiction and brought them within the superintendence of this Court: but that it was not meant to exhaust those Courts as the only Courts subject to this Court's superintendence is apparent from section 16 of the Letters Patent of 1865, which ordain that "the said High Court of Judicature at Bombay shall be a Court of appeal from the Civil Courts of the Presidency of Bombay, and from all other Courts subject to its superintendence." The result is that, as pointed out by Green, J, in Pirbhai Khimji v. B. B. & C. I. Ry. Co.(1), taking the Act and the Letters Patent together, "the High Court has superintendence where it has appellate jurisdiction, and has appellate juris-

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diction where it has superintendence." The view taken by Green, J., in the case just cited was this. He said :- "Section 15 of the Charter Act does not, in my opinion, limit the superintendence of the High Court to the Courts which may be subject to its appellate jurisdiction; it only says that over such Courts the High Court shall have superintendence, not that it shall have superintendence over those Courts which are subject to its appellate jurisdiction, and over no others." This view, I think, is borne out by Act II of 1864, which provides for the administration of civil and criminal justice at Aden. The Charter Act was passed in 1861; Act II of 1864 brought the Resident's Court at Aden under the superintendence of this Court for certain purposes and in certain matters without giving any appellate jurisdiction to the latter over the former. Before the Letters Patent of 1865, there was then a Court subject to this Court's superintendence, but not subject to its appellate jurisdiction. Section 13 of the Letters Patent was obviously meant to include such Courts and not merely those referred to in section 15 of the Charter Act. Even if we assume that the Courts referred to in section 13 of the Letters Patent are Courts subject to the appellate jurisdiction of this Court and no other, I do not see any good ground for restricting the term "appellate jurisdiction" to its strict and technical sense. Where there is an appeal to the Court allowed by any law or regulation, in hearing the appeal it exercises its appellate jurisdiction; but the same jurisdiction may be exercised and is, as a matter of fact, exercised for all practical purposes where the Court decides a suit referred to it by law on questions both of fact and of law. That was the view taken by Phear and Mitter, JJ., in John Thomson, (1) where they held that a reference was "a modified form of appeal." That decision was noticed in terms of approval by Green, J., in Pirbhai v. B. B. & C. I. Ry. Co. and I see no reason to dissent from the view there taken. This view derives further support from the ruling of this Court in Bhagwandas Narotamdas v. Jedu valad Babu and others, (2) where the present Chief Justice held that the term "appellate jurisdiction" in section 15 of the Charter Act should be construed to include the power of revision.

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But it was urged before us that this last ruling is opposed to the decision of a Full Bench of this Court in Khoja Shivji v. Hasham Gulam, (1) and the remarks of Sargent, C.J., in his judgment in that case that "a power of revision is not an incident of appellate powers, but, on the contrary, can only be exercised where there is no appeal" were relied upon. But the conflict between the two decisions is, in my opinion, more apparent than real. In the Full Bench case the fact was, as pointed out by Farran, J., in his judgment, that by an Order in Council the Civil Courts in Zanzibar were, for merely jurisdictional purposes, assimilated to the area of a Bombay District "in order that the application of the Procedure Acts" to those Courts "may be exactly defined." And the exact definition was, among other things, that this Court should be a Court of appeal according to the Civil Procedure Code from the decisions of the Zanzibar The inclusion of the power to hear appeals under the Civil Procedure Code necessarily implied the exclusion of the power to act in revision under section 622 of that Code. That was the ratio decidendi in the Full Bench case; but that reasoning can have no bearing on the question whether the term "appellate jurisdiction," as used in the Charter Act and the Letters Patent, is not large enough to mean a jurisdiction of superintendence.

It follows then, from these considerations, that the Resident's Court at Aden is a Court subject to the superintendence of this Court within the meaning of section 13 of the Amended Letters Patent of 1865. The fact that the superintendence is of a partial and limited character cannot affect the question. There are some Courts subject to the appellate jurisdiction of a High Court in certain cases only, appeals in other cases being allowed by law direct to the Privy Council. As pointed out by Green, J., in the Bombay case above cited and by Phear, J., in the case already mentioned, the existence of appellate jurisdiction, though limited, is sufficient to bring a Court within the superintendence of the High Court. A fortiori, the power of interference given by Act II of 1864 to this Court on a reference, though limited to certain suits, does not make the Resident's Court less a Court subject to this Court's superintendence.

The preliminary objection must, therefore, be overruled. On the merits, it has not been denied before us that the act complained of in the plaint of the applicant was done under the Resident's orders. If it was so done, the Resident is practically interested in the suit. We have no doubt that that circumstance is not likely to weigh with him in trying and deciding the case; but the decided cases show that if a party has reasonable grounds for apprehending that the Judge who is to try his case is likely to be biassed, he is entitled to a transfer of the case from that Judge. It is true that the applicant can have the suit referred to this Court under Act II of 1864; but I think that upon the whole the proper course to adopt is to order the transfer prayed for. Costs of this application to be costs in the cause.

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Rule made absolute.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

NARASIMHA SHANKAR DESHPANDE (ORIGINAL PLAINTIFF),
APPELLANT, v. BALWANT LAKSHMAN (ORIGINAL DEFENDANT),
RESPONDENT.*

1903. August 4.

Libel—Privilege—Subordinate Government officer making a report to his superior—Imputations contained in the report—Protection.

The defendant, a Chief Constable of Police, in reply to a request from his superior for a report as to whether the plaintiff should be granted an additional license for arms, made in the course of his report certain imputations defamatory of the plaintiff, and recommended not only that no additional license should issue to the plaintiff, but that his old license should be cancelled. In an action of libel against the defendant:—

Held, that the defendant was not liable as his communication was protected by privilege. It was the duty of the defendant as a police officer to make reports about persons asking for and holding licenses for arms, and the communication complained of was made by him in the discharge of a public duty which he owed to his superior officer. The mere fact that the defendant made the communication for the purpose of getting the plaintiff's license cancelled, though his superior officer had never asked his opinion about the cancellation, is not sufficient to destroy the privilege, in the absence of any satisfactory evidence that the

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defendant was actuated by malice, or that the opinion expressed, even if erroneous, was not honestly formed.

APPEAL from the decision of B. C. Kennedy, District Judge of Sholápur-Bijápur, at Sholápur.

Suit to recover damages for libel.

On the 1st October, 1900, plaintiff made an application to the District Magistrate, alleging that the Police were ineffective and that he wanted an additional gun for protection against dacoits. This application was forwarded to the District Superintendent of The latter officer sent it to the Chief Constable (defendant) who forwarded it to the Thánadár of the village where the plaintiff lived.

The Thána Amaldar (officer) replied that the proposed issue of an additional gun was unnecessary. The statements of the plaintiff as to his unprotected condition were false and made because the police had searched his house in connection with the Chadchan highway robbery. There were two factions in the village, of one of which plaintiff was the head. On all these grounds no new license should be issued to plaintiff, but his old one should be taken away.

The Chief Constable forwarded the Thana Amaldar's report repeating the substance of it and then adding :-- "The reasons given by the Thana Amaldar are correct; the applicant (plaintiff's) house was searched in the recent Deshmukh's case and then I learned what his character was. I concur with the recommendations of the Thána Amaldar."

The District Superintendent of Police forwarded the correspondence to the District Magistrate repeating the remarks of the Thánadár and Chief Constable and adding some remarks of his own.

The license of the plaintiff was in consequence cancelled.

Plaintiff filed a suit against defendant to recover damages, alleging that in the month of December, 1900, he falsely and wantonly reported that plaintiff was an associate of dacoits and caused his arms license to be cancelled, thereby injuring his reputation and causing him annoyance.

Defendant contended (inter alia) that the report was made honestly in the execution of his duty.

The lower Court found that the defendant did not report that the plaintiff was an accomplice of thieves and dacoits, and that the defendant was not liable to any damages.

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Plaintiff appealed to the High Court.

D. A. Khare for the appellant (plaintiff):—The defendant could at the most claim a qualified privilege to the statements made by him in the report: see Odgers on Libel and Slander, pages 206-232. Here the defendant was only called upon to report on the point whether a fresh license should issue; but he goes further and states not only that a fresh license should not issue to the plaintiff but his old license should be cancelled. The occasion, therefore, cannot be regarded as privileged. Again, the circumstances do not show that any duty was cast upon the defendant to make the imputations: the plea of qualified privilege, therefore, cannot avail him.

The Government Pleader for respondent (defendant):—The occasion becomes privileged under section 51 of the Bombay District Police Act (Bombay Act IV of 1890). Again, in this case the plaintiff has not proved any malice on the part of the defendant: see also Jehangir v. Secretary of State (1) and Shepherd v. Trustees of the Port of Bombay. (2)

D. A. Khare, in reply:—Section 51 of the Bombay District Folice Act (Bombay Act IV of 1890) does not authorize a police officer to perpetrate a libel and to gratuitously assail the character of a person.

CHANDAVARKAR, J.—The libel complained of in the plaint is that the defendant in his capacity of Chief Constable of Pandharpur sent in December, 1900, a false and malicious report to the District Superintendent of Police, Sholapur, recommending that the license held by the plaintiff for a gun under the Arms Act should be cancelled because he "was an associate of thieves and dacoits." The report sent in by the defendant does not contain these words; but the language used in it is plainly defamatory of the plaintiff, though it may not suggest that he is an associate of dacoits. Moreover, the defendant in his deposition admits that

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he did give information to the District Superintendent that the plaintiff was "harbouring offenders" and that his report was based on his "fear that he" (the plaintiff) "associated with bad characters."

We cannot agree, therefore, in the District Judge's finding upon the evidence that the defendant did not report that the plaintiff was an accomplice of thieves and dacoits. But the material question in the case is whether the defendant's communication is not protected by privilege. As a Police officer it was his duty to make reports about persons asking for and holding licenses for arms, and the communication was made by him in the discharge of a public duty which he owed to his superior officer. The mere fact that the defendant made the communication for the purpose of getting the plaintiff's license cancelled, though his superior officer had never asked his opinion about the cancellation, is not sufficient to destory the privilege, because as pointed out by Baron Parke in Toogood v. Spyring 1) "such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." But it was said that there was no truth whatever in the report sent and information given to the District Superintendent of Police and that there was no reasonable ground for the imputations on the plaintiff's character. The law as to such privileged communications is tersely summed up by the editors of Smith's Leading Cases in their notes to the leading case of Ashby v. White (page 263, 10th Edition). as follows :- "In such cases, generally speaking, however harsh, hasty, or untrue may be the language employed, so long as it is honestly believed by the speaker or writer to be true, it does not furnish a legal ground of action; see Todd v. Hawkins, (2) per Willes, J.; and the definition of privileged communications in Marrison v. Bush (8); and provided he believed them to be true, it does not matter that he had no reasonable grounds for his belief: Clark v. Molyneux.(4) Nor, it seems, is it essential, if the occasion be privileged, that the writer or speaker believe the statement to be true, provided he make it without malice in fact,

^{(1) (1834) 1} C. M. & R. 181.

^{(2) (1837) 8} C. & P. 88.

^{(3) (1855) 5} E. & B. 344, 348. (4) (1877) 8 Q. B. D. 287.

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for it may be his duty to communicate statements which he himself does not believe; ib. per Bramwell, L. J.; see Jenoure v. Delmege. (1)? In Clark v. Molyneux, Bramwell, L. J., says: - "A person may honestly make on a particular occasion a defamatory statement without believing it to be true; because the statement may be of such a character as on that occasion it may be proper to communicate it to a particular person who ought to be informed of it......If the defendant was actuated by some motive other than that which would alone excuse him, the jury may find for the plaintiff." In the present case it is alleged that the defendant was actuated by a malicious motive, and if there is satisfactory evidence leading to the conclusion that the defendant was actuated by malice in fact in making the communication to his superiors, the privilege would be destoryed. The evidence from which we are asked to infer malice is contained in the depositions of the plaintiff and the defendant. The plaintiff states that there have been two factions in the village, to one of which he belongs and the other is headed by the Police Patel, a bhauband of his. The defendant admits this. According to the plaintiff he had sent petitions to the District Superintendent of Police and the District Magistrate against the Police in 1899 and the defendant suspected him of having sent an anonymous petition against him charging him with bribery. The defendant denies this. He states that the plaintiff "has an objection to the Police who are at Mandrup and visit there "; that in 1900 the plaintiff's house was searched by the Thánadár Gul Mahomed in connection with a robbery committed at Chadchan and that he always intrigued against the Police. All this evidence proves that the plaintiff was making complaints against the police officers and the police officers were reporting against him suspecting that he was intriguing against them and assisting bad characters. These complaints and counter-complaints did no doubt produce hostility between the plaintiff and the Police, but it was hostility brought about by the opinion already formed by the police officers against the plaintiff's character. There is nothing to show that that opinion, though erroneous, was not honestly formed; and the communication of that opinion by the detendant to his

NARASIMUA V. BALWANT superiors cannot be held to have been actuated by any malicious motive when the evidence before us is equally consistent with the view that, honestly believing the plaintiff to be an intriguer. and having regard to the search of his house in connection with the Chadchan robbery, the defendant thought that it was his duty to inform the District Superintendent of Police of the opinion he had formed as to his character. "Communications of this kind," to borrow the language of Alderson B. in Todd v. Hawkins (1). "should be viewed liberally," and unless it is proved clearly that they were made with the malicious intention of defaming the plaintiff, the verdict must be for the defendant. What is relied upon as evidence of malicious intention is evidence of occurrences and the mutual relations of the parties which led the defendant to entertain a bad opinion about the plaintiff and to report it to his superior officers in the discharge of his duty. The evidence of malice in fact is not, in our opinion, so clear and unequivocal as to destroy the privilege. We must confirm the decree with costs.

Decree confirmed.

(1) (1837) S C. & P. 88.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1903. August 4. NARASIMHA SHANKAR DESHPANDE (ORIGINAL PLAINTIFF), APPELLANT, v. IMAM VALAD MAHAMAD (ORIGINAL DEFENDANT), RESPONDENT.*

Malicious search—Police Officer searching a house under orders for arms under a cancelled license—Acting in the discharge of duty—Dishonesty—Action.

On the 1st October, 1900, the plaintiff applied to the District Magistrate to renew his existing license for arms and for the issue of an additional license for fresh arms. The District Magistrate, however, cancelled the plaintiff's existing license and declined to grant him a license for fresh arms. This order was sent on to the defendant, the officer in charge of the Police Station at the village where plaintiff lived, with a direction that it should be communicated to the plaintiff and that such arms as there might be in his possession should be attached. The defendant accompanied by a Panch went to the plaintiff's house, communicated to him the contents of the order passed by the District Magistrate

and called upon him to give up the gun which he held under the cancelled license. The plaintiff produced a gun; but the defendant suspecting that that was not the gun in respect of which the cancelled license had been granted, searched the plaintiff's house, but no gun was found. The plaintiff thereupon such the defendant for maliciously searching his house.

Held, that the defendant was not liable (1) as he was acting in the discharge of a duty recognized by law when he searched the house, and (2) as it was not proved by the plaintiff that the defendant acted dishonestly and was prompted by a desire to injure the plaintiff.

APPEAL from the decision of B. C. Kennedy, District Judge of Sholápur-Bijápur, at Sholápur.

Suit to recover damages for maliciously searching a house.

On the 1st October, 1900, plaintiff applied to the District Magistrate for a renewal of his license for arms and for an additional license for fresh arms. The District Magistrate declined to grant a license for fresh arms and ordered that his license should be cancelled. This order was sent to the defendant, the officer in charge of the Police Station at the village where plaintiff lived, with a direction that it should be communicated to the plaintiff and that such arms as there might be in his possession should be attached.

The defendant on the 30th December, 1900, accompanied by a Panch, went to the house of the plaintiff, communicated to him the order passed by the District Magistrate and asked him to deliver up the arms in his possession. The plaintiff tendered to him a gun; but the defendant, alleging that the gun tendered was not the gun referred to in the license, searched the plaintiff's house. At that time the house was full of guests and ladies. No other gun was found.

Plaintiff then filed a suit against the defendant to recover damages for maliciously and without authority searching his house and thereby causing him annoyance and injuring his reputation.

Defendant contended (inter alia) that he was not acting maliciously or in excess of his authority and that he was carrying out the orders of his superior.

The lower Court held that the defendant having searched the plaintiff's house under legal authority and without malice had done the plaintiff no wrong.

Plaintiff appealed to the High Court.

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1903. Nahasimha v. Imam. Branson (with him D. A. Khare), for the appellant (plaintiff):—
The defendant claims protection under section 51 of the Bombay District Police Act (Bombay Act IV of 1830). That section, however, has no application to the present case. The chapter containing section 51 refers to departmental discipline. It cannot override the provisions of the Indian Arms Act (XI of 1878) which requires a warrant from a competent authority to institute a search for guns, &c. In the present case no such warrant was issued and therefore section 11 of the Bombay District Police Act (Bombay Act IV of 1890) could afford no protection to the defendant. Section 80 of the Act also would not protect him.

The Government Pleader for the respondent (defendant):—
The defendant claims protection under section 51 of the Bombay
District Police Act (Bombay Act IV of 1890). Assuming that
he acted in excess of his authority, then section 80 of the Act
would protect him: see also Raghavendra v. Kashinathbhat (1);
Harish Chunder v. Nishi Kanta (2) and Ramayya v. Sivayya.(3)

CHANDAVARKAR, J.—We think that the District Judge is right in the view he has taken as to the legality of the act of the defendant complained of as wrongful by the plaintiff. The plaintiff held a license for a gun under the Arms Act, which was to expire on the 31st of December, 1900. Some time before that date, i.e., on the 1st October, 1900, the plaintiff applied to the District Magistrate for a renewal of the license and for an additional license for fresh arms. The application was forwarded for enquiry by the Police and the result of it was that the Police recommended that the license already held by the petitioner should be cancelled and that his application for a fresh license should be refused. Acting upon that recommendation, the District Magistrate passed an order cancelling the plaintiff's license and declining to grant a license for fresh arms. This order was forwarded to the District Superintendent of Police with a direction that it should be communicated to the plaintiff and that the gun he held under the cancelled license should be attached. The District Superintendent sent the order on to the

Chief Constable with a direction that it should be communicated to the plaintiff and that such arms as there might be should be attached. The Chief Constable forwarded the order to the defendant, who was the officer in charge of the Police Station with jurisdiction over the place where the plaintiff lived, and instructed him to carry out its terms. Accordingly on the 30th of December, 1900, the defendant, accompanied by a Panch whom he had collected for the purpose, went to the plaintiff's house and communicated to him the contents of the District Magistrate's order and called upon him to give up the gun which he held under the cancelled license. The plaintiff immediately produced a gun. What happened afterwards is deposed to as follows by the plaintiff: - "Imam, defendant, said: 'Though you have tendered this gun I have yet to search your house.' At the time my house was searched I had some guests from Mohili, &c., and some Gosha women." The defendant's version is this:-"He," i.e., the plaintiff, "produced a gun as soon as I went to his house. He said 'This is my gun.' I at once suspected that he had another gun. I immediately made a search I did not find a gun. I thought the order of the District Superintendent of Police was sufficient. The gun he delivered to me was not the gun I had seen him carrying before. That was quite different with brass ornaments and in good condition with ivory inlaying; I told him to produce his proper gun. He said he had none." In his cross-examination the defendant states that he searched because he suspected the plaintiff's real gun was in the house, and that he concealed the order of the Di trict Superintendent of Police to authorize a search.

The order of the District Superintendent of Police does not in terms authorize a search, but his direction that "such guns as there may be should be attached "may be taken as implying that the defendant should do all that might be necessary for the rurposes of the attachment and that is substantially the defendant's case. His defence is that he made the search of the plaintiff's house in obedience to a duty imposed on him by law and prescribed by the orders of his superiors and that, therefore he is protected. The law applicable to such a case is explained by Lord Watson in 1903.

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1903. NARASIMHA V. IMAM. Allen v. Flood (1), where he says :- "There is a class of cases which have sometimes been referred to as evidencing that a bad motive may be an element in the composition of civil wrong : but in these cases the wrong must have its root in an act which the law generally regards as illegal but excuses its perpetration in certain exceptional circumstances from considerations of public policy. These are well known as cases of privilege, in which the protection which the law gives to an individual who is within the scope of these considerations consists in this, that he may with immunity commit an act which is a legal wrong and but for his privilege would afford a good cause of action against him, all that is required in order to raise the privilege and entitle him to protection being that he shall act honestly in the discharge of some duty which the law recognises and shall not be prompted by a desire to injure the person who is affected by his act. Accordingly in a suit brought by that person, it is usual for him to allege and necessary for him to prove an intent to injure in order to destroy the privilege of the defendant." The decision then of the present case turns upon two questions: first, was the defendant acting in the discharge of some duty which the law recognised when he searched the plaintiff's house; second, if he was, is it proved by the plaintiff that he acted dishonestly and was prompted by a desire to injure the plaintiff?

The solution of the first of these two questions depends not merely on the fact that the defendant was acting under the orders of his superiors which he was bound to obey, but also on the law in accordance with which those orders were given. Section 50 of the Bombay. Police Act, which was cited by the learned Government Pleader in support of the defendant's action, speaks of orders lawfully issued by a superior Police officer to a subordinate. On the facts here it is clear that the plaintiff's license was cancelled, and that on learning of its cancellation the plaintiff was bound, under section 16 of the Arms Act, to deposit his gun "without unnecessary delay" with the defendant who was the officer in charge of the nearest police station. The defendant had a right to demand the gun, the license of which had been cancelled, and it is not contended for the plaintiff that

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when it was demanded the plaintiff could not produce it and give it up to the defendant. Nor could such contention avail the plaintiff, having regard to the fact that when he was called upon to give up his gun, the license of which had been cancelled, he did produce one. So far then the defendant was acting in the discharge of a duty recognised by law; and it is not alleged that there was anything wrongful in that. The gun produced by the plaintiff was admittedly useless; and the defendant's case is that suspecting that the plaintiff was not producing the real gun for which he had held a license, he caused a search of the house to be made. Under section 165 of the Criminal Procedure Code a Police officer in charge of a police station is authorized to make a search during an investigation when he considers that the production of a thing is necessary to the conduct of an investigation into any offence which he is authorized to investigate, and there is reason to believe that a person to whom a summons or order under section 94 of the Code might be issued will not produce the thing. The District Judge has held that it was under this section that the defendant acted in searching the plaintiff's house. That section requires, before it can be brought into operation, that there must be an offence which the Police officer is authorized to investigate. According to the District Judge, as soon as the defendant suspected that the plaintiff was not producing the real gun, there was, in the defendant's opinion, an offence committed, and he could act under section 165 of the Criminal Procedure Code. We agree with the District Judge in that view. A public functionary, authorized by a statute to make a search, must, in exercising that authority, act within the limits allowed by the statute itself. If a Police officer suspects that an offence has been committed which he is authorized to investigate he can make a search under section 165. It cannot be contended that he is to exercise no judgment, no discretion whatever; if it were not allowed "he could not discharge his duty without great peril and apprehension, if in consequence of a mistake, he became liable to an action" (per Lord Tenterden in Cullen v. Morris (1)). But the suspicion that there is an offence to investigate and therefore a search to make must be formed

1903. Nahasimha honestly. While it must be left to the judgment of the Police officer making a search under section 165 to decide whether there is such an effence calling for a search, if, instead of a mere mistake in forming his judgment, it is shown that that judgment was not formed honestly but with an intent to injure the party subjected to the search, he cannot invoke the protection of that section, and it must follow that he was using his authority unlawfully.

The onus of proving that the defendant did not act honestly but with intent to injure lies on the plaintiff. In other words, the plaintiff must show that in purporting to act under section 165, Criminal Procedure Code, the defendant acted intentionally without just cause or excuse. It is contended this is shown by the evidence proving that the plaintiff's relations with the Police were strained; that the defendant had reported that the plaintiff was not a fit person to hold a license under the Arms Act; that the defendant marched to the plaintiff's house with a Panch and made the search soon after he had communicated to the plaintiff the fact of the concellation of his license; that he concealed from the plaintiff the order of the District Superintendent of Police, and that he made the search at a time when the plaintiff had guests and Gosha women in his house. These facts, it is urged, indicate malevolence on the defendant's part and prove that the search was made more with a view to annoy the plaintiff and out of spite than with an honest desire to procure the gun, the license of which had been cancelled. But the defendant was acting in obedience to the lawful order of his superiors that the gun in question should be attached. It is not alleged that the defendant personally bore any malice towards the plaintiff. On the other hand, it is admitted that he was a new arrival in the village where the plaintiff lived. The gun produced by the plaintiff was old and useless-a circumstance which might well have led the defendant to suspect that the plaintiff was not producing the real gun. On the evidence, therefore, as a whole, we cannot hold that the defendant is proved to have acted with an intent to injure the plaintiff. We must, therefore, confirm the decree with costs.

APPELLATE CIVIL.

Before the Hon'ble Mr. E. T. Candy, C. S.I., Acting Chief Justice, and Mr. Justice Chandavarkar.

CHHAGANLAL SHALIGRAM SHET (OBIGINAL PLAINTIFF), APPEL-LANT, v. EAST INDIAN RAILWAY COMPANY (OBIGINAL DEFENDANT), RESPONDENT,*

1903. June 24.

Railway Company—Consignment of goods—Diversion of consignment while en route—Delivery to the original consignee—Liability of the Railway Company—Railway Act (IX of 1890), section 77—Notice—Second appeal—Plea of want of notice whether allowable—Practice.

G booked a consignment of goods from the Sakrigali Ghat Station on the East Indian Railway to R at Kamptee, a station on the Bengal-Nagpur Railway. Whilst the consignment was en route to Kamptee, G directed the railway servants at Sakrigali Ghat Station to notify to the Station Master at Kamptee to deliver the consignment to plaintiff at Nargaon. This direction was given: but disregarding the order the Station Master at Kamptee delivered the consignment to R at Kamptee. The plaintiff sued the East Indian Railway to recover compensation for loss of goods.

Held, that the Railway Company was liable in damages; the case was a simple case of breach of contract; the defendant contracted to carry the goods and deliver them at Nargaon to the plaintiff and failed to do so.

Held, further, that the liability of the Railway Company was not affected by the fact that the Station Master at Kamptee acted wrongly in disregarding the instructions which he had received from Sakrigali Ghat Station.

Held, further, that a plea of failure to give notice under section 77 of the Indian Railway Act, 1890, urged for the first time in second appeal, and not supported by any evidence that such notice was not given, was taken too late. This could not be regarded as a stale demand as the suit was filed within two months after the cause of action arose.

SECOND appeal from the decision of Dayaram Gidumal, District Judge of Khandesh, confirming the decree passed by V. N. Rahurkar, Subordinate Judge at Bhusawal.

Suit to recover compensation for loss of goods.

One Gangaram booked, on the 27th May, 1900, a consignment of 166 bags of *khesary* (lakh grain) from Sakrigali Ghat Station, a station on the East Indian Railway, to one Rupram Govindram at Kamptee, a station on the Bengal-Nagpur Railway. Whilst the consignment was *en route* to Kamptee, Gangaram, on the 31st

" Second Appeal No. 631 of 1902.

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E. I. RAIL-WAY COMPANY. May, 1900, requested the railway servant at Sakrigali Ghat to divert the consignment from Kamptee to the plaintiff at Nargaon, another station on the same line (Bengal-Nagpur Railway), 234 miles distant from Kamptee. This diversion was communicated to the Station Master of Kamptee. But the latter took no notice of the communication as the original consignee Rupram Govindram threatened to sue the Company for damages if the consignment were not delivered to him. The consignment was accordingly delivered to Rupram on his paying the hire and passing an indemnity note.

The plaintiff thereupon filed this suit against the East Indian. Railway to recover Rs. 1,164 as compensation for loss of goods.

The Subordinate Judge dismissed the suit for non-joinder of parties, inasmuch as the Bengal-Nagpur Railway was not joined as a defendant.

On appeal, the District Judge held that the Bengal-Nagpur Railway was not a necessary party to the suit, but held that the defendant was not liable on the following grounds:

"Though the Station Master was guilty of default, I do not see why the defendant should be held liable. The Station Master was either the agent (or sub-agent) of the defendant or he was not. If he was, his act was clearly not within the scope of his authority and the defendant is therefore not responsible (vide section 238, Contract Act, 1872). If he was not, defendant did his utmost to protect plaintiff's interest and there can be no liability."

Plaintiff preferred a second appeal.

D. A. Khare, for the appellant.

Scott (Advocate-General), with Crawford & Co., for the respondent.

CANDY, ACTING C. J.—In this case we have no doubt that on the merits the plaintiff was entitled to a decree.

In the first Court one of the defences was that the defendant's servant had no authority to divert the consignment, and that therefore the defendant was not bound by the act of the servant.

In the District Court this defence was disallowed by the District Judge, who held that the Station Master at Kamptee was guilty of default in directing the delivery of the goods to the original consignee, but the District Judge further held that the defendant Company was not liable for the act of the Station Master which

was not within the scope of his authority (quoting section 238 of the Contract Act).

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We are unable to agree with the applicability of this section. It seems to us that this is a simple case of breach of contract; the defendant contracted to carry the goods and deliver them at Nargaon and failed to give such delivery to the plaintiff. The Station Master at Kamptee may have acted wrongly in disregarding the telegram which he had received, but that fact cannot divest the Company of its liability under the contract.

As there is no dispute about the rates, the plaintiff would be entitled to the sum claimed with all costs.

But in this second appeal the defendant Company have filed cross-objections, the third one being pressed by the learned Advocate-General. That objection runs:—"That the lower Courts should have dismissed this suit on the ground (inter alia) that the plaintiff did not prove that his claim for compensation had been preferred in writing by him or on his behalf to the Railway administration as required by section 77 of the Indian Railway Act, 1890."

That section provides that a person shall not be entitled to compensation for the loss of goods delivered to be so carried, unless his claim to the compensation has been preferred in writing by him or on his behalf to the Railway administration within six months from the date of the delivery of the goods for carriage by railway.

Here the breach of contract occurred in May or June, 1900. The suit was filed and summons was served on the defendant in August, 1900. Neither in the written statement nor in the arguments before the Court of first instance, nor in the District Court on appeal, was any mention made of this plea. No affidavit has now been filed on behalf of the Agent of the Company to the effect that no notice was received according to the section. Under these circumstances, we are asked to assume that no such notice was given.

The learned Advocate-General's argument is based on the proposition that the plaintiff, not being entitled to compensation unless notice was given, was bound to allege in his plaint and prove that such a notice had been given; in short that proof of the notice was a condition precedent to the filing of the claim.

E. I. RAIL-WAY COMPANY. We are unable to agree with that view. If notice had not been given it is difficult to suppose that the Agent or his officers or their legal advisers would not have made mention of the fact.

We do not think that it would be right at this stage of the case to send it back in order that evidence might be taken. We have no reason to suppose that the notice was not given. The object of the section apparently is to prevent stale claims, and this most certainly was not a stale claim, for the Company were sued within two months of the breach of the contract.

We therefore reverse the decisions of the lower Courts and award the amount of the claim with costs in all Courts.

Decree reversed.

APPELLATE CIVIL.

Before the Hon'ble Mr. E. T. Candy, C.S.I., Acting Chief Justice, and Mr. Justice Chandavarkar.

1903. June 30. AMARCHAND LAKHMAJI AND ANOTHER (ORIGINAL PLAINTIFFS), APPEL-LANTS, v. KILA MORAR AND ANOTHER (ORIGINAL DEFENDANTS), RES-FONDENTS.*

Transfer of Property Act (IV of 1882), sections 58, clauses (b), (d), and 98— Usufructuary mortgage—Simple mortgage—Anomalous mortgage—Suit by mortgagees for recovery of debt and in default of payment by mortgagors for foreclosure and possession.

A mortgage-deed (1) put the mortgagees in possession of the mortgaged property and authorized them to retain possession until payment of the mortgage-money, the mortgagers being given credit for all profits recovered from the mortgaged property over and above the Government assessment. (2) It also contained a personal covenant by the mortgagers to pay the mortgage-money and an implied agreement that in the event of non-payment the property should be sold (the debt to be recovered from the mortgaged land and from the persons and from other property of the mortgagors).

Sometime after the date of the mortgage the mortgages let out the mortgaged property to the mortgagors for a certain term, and before the expiration of the term, the mortgages brought a suit for the recovery of the debt and in default of payment by the mortgagors for foreclosure and possession.

Held, that owing to the proviso (1), the mortgage was usufructuary within the meaning of clause (d) of section 58 of the Transfer of Property Act (IV of

1882) and owing to the proviso (2), it was a simple mortgage under clause (b) of the section. The transaction was therefore an anomalous mortgage provided for by section 98 of the Act, being a combination of a simple mortgage and usufructuary mortgage. In such a case the rights and liabilities of the parties must be determined by the contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

Held, further, that though the plaintiffs were not entitled to regain possession, they having let out the property to the mortgagors for a term, still that circumstance did not affect the distinct and independent right of the plaintiffs to sue for the mortgage-money and to obtain a decree for sale of the mortgaged property.

SECOND appeal from the decision of H. L. Hervey, District Judge of Surat, confirming the decree of Mohanrai D., Subordinate Judge of Bulsár.

Suit for recovery of mortgage-debt and in default of payment for foreclosure and possession.

The property in suit was mortgaged with possession to the plaintiffs Amarchand Lakhmaji and Nanchand Lakhmaji by the defendants Kila Morar and Bai Ratan, widow of Dalu Morar, under a registered mortgage-deed, dated the 13th February, 1900. The mortgage-deed provided as follows:—

We have taken from you Rs. 499-4-0 for making payments to our moneylenders. The said rupees four hundred and ninety-nine and a quarter have duly become payable to you by us. Interest on those rupees accrues due at the rate of Rs. 1-4-0 per cent. per month. We are to make full payment to you of the said moneys together with compound interest on the balance which may be found due at the Divali at the expiry of one year from this day. We, as security for the said moneys, pass in writing to you the undermentioned land belonging to us by this deed-of-mortgage with possession and give the same into your possession on condition that we are to redeem the said land from your possession only when we pay in full your moneys together with interest; we are not to redeem the said land without paying off your moneys, nor can we pass the same in writing to any other person in any way..... We are to pay your moneys free of risk. If we fail to pay off your moneys in accordance with the abovementioned condition, you may take legal proceedings against us, and you are at liberty to recover as you like the said moneys together with costs from the undermentioned mortgaged land or from the properties and estate of all sorts belonging to us other than the said land, or from our persons, or from our heirs and others. You have henceforth the right to give undermentioned land in lease. So you may lease the said land to any one. And if you realize and recover any profits over and above the Government assessment of the said land, you are to give us credit for what may be recovered in this document.

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AMARCHAND v. KILA MORAR. On the 22nd March, 1900, the plaintiffs let out the mortgaged property to the defendants for a certain term, but the defendants having failed to pay rent, the plaintiffs on the 19th December, 1901 (that is, before the expiry of the defendants' lease), brought the present suit to recover possession of the property on foreclosing the defendants after the period of grace allowed by law.

The defendants admitted the mortgage and applied for the payment of the debt by instalments.

The Subordinate Judge dismissed the suit, holding that the mortgage was usufructuary which was not liable to be foreclosed.

On appeal by the plaintiffs, the Judge confirmed the decree on the following grounds:—

The mortgage of the plaint land is of the nature of usufructuary mortgage, although the deed contains a covenant to repay the amount advanced within one year. A suit for foreclosure is therefore undoubtedly not maintainable. Appellants' pleader does not seriously dispute this proposition, but urges that plaintiffs should nevertheless have been awarded possession of the mortgaged property as defendants have failed to pay the rent due under the rent-note under which they retained the land in their possession. In support of this argument Mr. Barjorji quotes cases in which the mortgagee obtained possession of the mortgaged property through the Court, when the mortgagor had failed to put him in possession, or, having done so, had wrongfully dispossessed him. Here such is not the case. The only way in which appellants can recover possession of the plaint property is by suing to eject defendants as defaulting tenants. The rent-note passed by the latter has not even been produced, and it is impossible for the Court to assume that its terms entitled plaintiffs to take possession of the land, when one year's rent remained unpaid. Then Mr. Barjorji contended that the lower Court should have passed a decree enabling plaintiffs to recover the debt by sale of the mortgaged property. No doubt a decree for sale could have been passed if it had been asked for in the plaint (Hemraj v. Trimbak, P. J. for 1897, p. 416; Ramayya v. Guruva, I. L. R. 14 Mad. 232), but the whole nature of the suit would have been altered if such an amendment had been allowed. I do not think plaintiffs can rely on the fact that at the end of the plaint they added a prayer for "any other relief that the Court may award." This is a common form of words and does not entitle plaintiffs to demand as of right the grant of a totally different relief to that which is specifically claimed. Additional Court-fee would have been required if a decree for sale had been passed; moreover, the Court could not assume that plaintiff would be willing to accept such a decree. A mortgagee, knowing that his debtor would

be unable to procure funds to redeem the mortgaged property, might sue for foreclosure and yet be quite unwilling to allow the property to be sold and pass out of his possession.

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The plaintiffs preferred a second appeal.

Gokuldas K. Parekh appeared for the appellants (plaintiffs).

There was no appearance for the respondents (defendants).

PER CURIAM:—The mortgage-bond in this case puts the mortgagee in possession of the mortgaged property, and authorizes him to retain possession until payment of the mortgagemoney, the mortgagors being given credit for all profits recovered from the land over and above the Government assessment; so far it is a usufructuary mortgage within the meaning of clause (d) of section 58, Transfer of Property Act.

The deed also contains a personal covenant by the mortgagor to pay the mortgage-money and an implied agreement that in the event of non-payment the property shall be sold (the debt is to be recovered from the mortgaged land and from the persons and other property of the mortgagors). So far it is a *simple mortgage* within the meaning of clause (b) of section 58, Transfer of Property Act.

The transaction then is an anomalous mortgage, provided for by section 98 of the Transfer of Property Act, being a combination of a simple mortgage and a usufructuary mortgage.

As such, the rights and liabilities of the parties should be determined as laid down in that section, by the contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

Here the plaintiff-mortgagee sued for recovery of the debt, and in default of payment by the mortgagors for foreclosure and possession. To that relief he is not entitled because he lost possession by leasing the land to his mortgagors for a term, and if he seeks to regain possession he must sue as a landlord on the determination of the tenancy. Though he asked for relief to which he is not entitled, that ought not to deprive him of his right to the relief which he can legally claim. The fact that the mortgagor went into possession as a tenant does not affect the distinct and independent right of the plaintiff to sue for the mortgage-money. An account must be taken of what is due on

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the mortgage and the plaintiff given a decree for sale. There is obviously no bar of limitation or institution fee. The claim should be valued at the amount of the debt sought to be recovered: Transfer of Property Act, section 92, and Hemraj v. Trimbak.(1)

We reverse the decrees of the lower Courts and remand the case to be disposed of in accordance with the above remarks. Costs to abide the result.

Decree reversed. Case remanded.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Jacob.

1903. July 4. MANEKSHAH SORABJI GANDHI (AFPLICANT-DEFENDANT), APPELLANT, v. DADABHAI JAMSHETJI (OPPONENT-PLAINTIFF), RESPONDENT.*

Civil Provedure Code (Act XIV of 1882), sections 344, 345, 588 (17) and 589—Application to be declared an insolvent—Subject-matter of the suit over Rs. 5,000 in value—First Class Subordinate Judge—Rejection of the application—Appeal—District Court,

In a suit, the subject-matter of which was over Rs. 5.000 in value, the plaintiff applied for execution. The defendant applied to be declared an insolvent under sections 344 and 345 of the Civil Procedure Code (Act XIV of 1882). The First Class Subordinate Judge rejected the application. An appeal was preferred to the High Court.

Held, dismissing the appeal and returning the memo. of appeal for presentation to the proper Court, that the appeal lay to the District Court under sections 588, clause (17), and 589 of the Civil Procedure Code (Act XIV of 1882).

Venkatrayer v. Jamboo Ayyan not followed.

APPEAL from the order passed by Bhaskar Shridhar Joshi, First Class Subordinate Judge of Surat, on the 7th October, 1901, in Miscellaneous Application No. 37 of 1899.

The plaintiff Dadabhai Jemshetji obtained against the defendant Manekshah Sorabji a decree in the Court of the First Class Subordinate Judge of Surat. The subject-matter of the decree was

* Appeal No. 4 of 1902.

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over Rs. 5,000 in value. The plaintiff having applied for the execution of the decree, the defendant by an application prayed for a declaration of insolvency under section 345 of the Civil Procedure Code (Act XIV of 1882). The Court rejected the defendant's application and ordered execution to proceed. Against the said order the defendant appealed.

H. C. Coyaji (with D. M. Darwala) for the respondent (plaintiff-opponent):—We have to urge a preliminary objection on the point of jurisdiction. Though the subject-matter of the decree was above Rs. 5,000 in value, still we contend that the defendant ought to have appealed to the District Court and not to this Court, because the present contention relates to the status of the defendant and not to the subject-matter of the suit. Further, the order is appealable under clause (17), section 588, of the Civil Procedure Code: see proviso to section 589 of the Code. The Court of the First Class Subordinate Judge of Surat is subordinate to the Court of the District Judge of Surat: see section 2 of the Code. Therefore the appeal ought to have been preferred to the District Court at Surat: Debi Prasad v. Jamna Das.(1)

G.S. Rao (with Ramdatt V. Desai) for the appellant (defendant-applicant):—The subject-matter of the suit being over Rs. 5,000 in value, the Court of the First Class Subordinate Judge of Surat, so far as the suit or any orders passed therein were concerned, is subordinate to the High Court and not to the District Court at Surat. Where the subject-matter of the suit is less than Rs. 5,000 in value and where the valuation of the suit is not the test of jurisdiction, then the Court of the First Class Subordinate Judge would be subordinate to the District Court: Venkatrayer v. Jamboo Ayyan. (2)

JENKINS, C. J.:—This is an appeal from an order rejecting with costs an application whereby the present appellant prays that he may be declared to be an insolvent under sections 344 and 345 of the Code of Civil Procedure. Any appeal that may lie from such an order would be under clause (17) of section 588 of the Code of Civil Procedure. Now section 589 of the Code

MAKEKSHAH t. DADABHAI. provides that:—"When an appeal from any order is allowed by this Chapter, it shall lie to the Court to which an appeal would lie from the decree in the suit in relation to which such order was made, or, when such order is passed by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court: provided that an appeal from an order specified in section 588, clause 17, shall lie—

- (a) to the District Court where the order was passed by a Court subordinate to that Court, and
 - (b) to the High Court in any other case."

The suit in relation to which the order of rejection has been made is one in which the subject-matter is over Rs. 5,000 in value. Mr. Coyaji for the respondents has taken a preliminary objection to the hearing of this appeal in the High Court on the ground that it should have been to the District Court. For the purposes of his argument he has referred us to section 2 of the Code which, among other things, provides that :- "'District' means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a 'District Court'), and includes the local limits of the ordinary original civil jurisdiction of a High Court: every Court of a grade inferior to that of a District Court, and every Court of Small Causes, shall, for the purposes of this Code, be deemed to be subordinate to the High Court and the District Court." So the question is, whether the Court that passed the order of rejection is of a grade inferior to that of the District Court? In my opinion it is, and I should have thought the point free from doubt but for the decision in Venkatrayer v. Jamboo Ayyan (1), where a different view was taken. But, with all respect for that decision, we see no reason to read into the section words which have no place there. We feel the more justified in declining to follow the decision in Venkatrayer's case inasmuch as the Allahabad High Court in Debi Prasad v. Jamna Das (2) has questioned the propriety of the Madras decision. In our opinion, therefore, the preliminary objection is sound, and we must accordingly dismiss this appeal. The memorandum of appeal will be returned

for presentation to the proper Court. Costs to abide the event of the appeal, if there is an appeal. If there is no appeal, then the appellant to pay the costs of this appeal. 1903.

MANEKSHAD v. DADABHAL

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Chandavarkar.

CHHAGANLAL HARIBHAI (OBIGINAL DEFENDANT 1), APPELLANT, v. DHONDU CHUDAMAN RANGRI AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT 4), RESPONDENTS.*

1903. July 8.

Practice—Procedure—Pending suit—Another suit based on the defence in the first suit—Specific Relief Act (I of 1877), section 39—Cancellation of instrument.

On the 16th March, 1899, the firm of Chhaganlal Haribhai brought Suit No. 96 of 1899 against Dhondu and Baba to recover a sum due on a bond passed by them to the firm. The defence pleaded that the bond was void, being passed for the balance due on wagering transactions. While this suit was pending, on the 13th June, 1899, Dhondu (one of the defendants in the suit) brought Suit No. 167 of 1899, to have the above-mentioned bond cancelled and delivered up to him, under section 39 of the Specific Relief Act (I of 1877). The Subordinate Judge-decided both the suits together; he dismissed the first suit and allowed plaintiff's claim in the second.

Held, that the form of specific relief provided for by section 39 of the Specific Relief Act (I of 1877) was founded upon the administration of protective justice for fear (quia timet); and that there could be no fear, in the second suit, that the plaintiff would suffer serious injury if he did not bring the suit, for the plea which was the foundation of the second suit was raised by him in the defence to the previous suit.

APPEAL from the decision of D. G. Gharpure, First Class Subordinate Judge of Dhulia.

Suit for cancellation of a bond under section 39 of the Specific Relief Act (I of 1877).

On the 16th March, 1899, Bhagwandas Narotamdas, Maganlal Dullabhdas, and Shamchandra Rampratap, trading under the name of Chhaganlal Haribhai, filed Suit No. 96 of 1899 against

1903. Chhaganlal v. Dhondu. Baba Chudaman and Dhondu Chudaman, to recover a sum of money with interest upon a bond passed in their favour by the defendants.

The defendants contended, inter alia, that the bond was passed for a balance due on wagering transactions, and that it was therefore void.

While this suit was pending, Dhondu Chudaman (defendant 2 in the first case) brought on the 13th June, 1899, Suit No. 167 of 1899 against Shamchandra Rampratap, Bhagwandas Narotamdas, Maganlal Dullabhdas and Baba Chudaman, to have the bond passed by him and Baba Chudaman to defendants 1, 2 and 3 (the plaintiffs in Suit No. 96 of 1899) cancelled under the provisions of section 39 of the Specific Relief Act (I of 1877).

The two suits were heard together.

Suit No. 96 of 1899 was decided on the 11th March, 1901. The Subordinate Judge, being of opinion that the transactions which resulted in the balance for which the bond was passed were wagering contracts, dismissed the plaintiffs' claim with costs.

In Suit No. 167 of 1899, the Subordinate Judge, on the same day, recorded the following order:—

"The plaintiff sues to have cancelled a bond passed by him and defendant 4 to defendants 1, 2 and 3, and which forms the subject-matter of Regular Suit No. 96 of 1809 of this Court, between the same parties. The bond is declared in that suit to be unenforceable against plaintiff and defendant 4, and the parties have bound themselves by that decision (vide Exhibit 24). The claim is therefore allowed. Considering, however, that plaintiff has shown unnecessary haste in instituting this suit, which was superfluous in view of the said Regular Suit No. 96 of 1899 of this Court, I order that each party should bear his own costs."

Defendant 1 in Suit No. 167 of 1899 appealed to the High Court.

Raikes (with him N. M. Samarth), for the appellant.

Scott (Advocate-General, with him C. A. Rele), for respondent 1.

V. V. Ranade, for respondent 2.

CANDY, J.:—How can you support the decree for a declaration given in your favour by the lower Court under section 39 of the Specific Relief Act (I of 1877)?

C. A. Rele.—In Suit No. 96 of 1899 we raised the defence that the bond was void, but that circumstance cannot deprive us of the right of suing for cancellation of the bond under section 39 of the Specific Relief Act (I of 1877). The relief sought in Suit No. 167 of 1899 was a separate relief and we were entitled to have the bond delivered up and cancelled. We could not have got this relief in Suit No. 96 of 1899. We had also reasonable apprehension in our mind that if the bond be left outstanding, it would cause us serious injury.

Another ground for bringing Suit No. 167 of 1899 was to save the bar of limitation. Article 91 of the second schedule to the Limitation Act (XV of 1877) provides that a suit for cancellation must be brought within three years.

N. M. Samarth, was not called upon.

CANDY, J .: - We think that the decree of the Subordinate Judge allowing the claim in the present suit cannot be supported. Suit No. 96 of 1899 was brought on the 16th March, 1899, by the firm of Chhaganlal Haribhai against Dhondu Chudaman and Baba Chudaman to recover on a bond passed to the firm by the defendants. The defence pleaded that the bond was void, being passed for the balance due on wagering transactions. On the 13th June, 1899. Dhondu Chudaman, one of the defendants in the prior suit, brought the present Suit No. 167 of 1899 to have the bond mentioned above cancelled and delivered up to him. He made his brother Baba a co-defendant in the second suit. The Subordinate Judge allowed the claim, but in so doing he failed to notice that the jurisdiction given to him under section 39 of the Specific Relief Act is dependent upon the exercise of his discretion. This form of specific relief is founded upon the administration of a protective justice for fear (quia timet to use the technical language of English law). In this case there can be no fear that the present plaintiff would suffer serious injury if he did not bring the present suit, for the plea which is the foundation of the present action was raised by him in the defence to the previous suit, and was decided at the same time that this suit was decided. That decision is now under appeal in the Court of the District Judge, Khandesh. The Subordinate Judge

1903. Chilaganlal v. Dhondu. considered that the plaintiff had shown unnecessary haste in instituting this suit, which, he said, was superfluous in view of the prior Suit No. 96 of 1899. In that view, with which we concur, he ought to have rejected the claim, and we now do so, reversing his decree.

Plaintiff must bear all costs, but those costs should only be costs incurred in Suit No. 167 of 1899 and not include any of the costs in Suit No. 96 of 1899.

Decree reversed.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.O.I.E., Chief Justice, and Mr. Justice Batty.

GANESH VAMAN KULKARNI (OBIGINAL PLAINTIFF), APPELLANT, v. WAGHU VALAD RAJARAM (OBIGINAL DEFENDANT), RESPONDENT.*

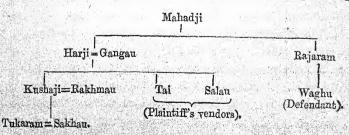
Hindu Law-Succession—Paternal aunt—Paternal greatgrandfather's grandson.

Under the Hindu Law as prevailing in the Bombay Presidency, the grandson of the paternal great-grandfather of the propositus is entitled to succeed in preference to the paternal aunt.

SECOND appeal from the decision of Gangadhar V. Limaye, First Class Subordinate Judge of Poona, with Appellate Powers, confirming the decree of Ruttonji Mancherji, Subordinate Judge of Junnar.

Suit to recover possession of immoveable property and mesne profits.

The following genealogical table will simplify the pleadings:-



* Second Appeal No. 32 of 1903,

1903. July 9. The plaintiff sued for possession and mesne profits, alleging that the property in suit originally belonged to Harji and after his death his son Kushaji was in possession, and after Kushaji his son Tukaram was in possession. Tukaram having died childless, the property was in the joint possession of his grandmother Gangau, his mother Rakhmau, and his widow Sakhau, who having remarried, the possession continued with Gangau and Rakhmau. Gangau died and thereafter Rakhmau was in sole possession. After Rakhmau's death, Harji's daughters Tai and Salau became entitled to the property as joint heiresses and they sold the property to the plaintiff. The defendant was a distant relation of Rakhmau and was in possession of the property. The plaintiff, therefore, brought the present suit.

The defendant pleaded that Harji had a brother Rajaram. The defendant was the son of Rajaram who was the the chulat-chult's (paternal uncle one degree removed) of the deceased Tukaram. Tai and Salau were the sisters of Tukaram's father Kushaji; therefore, the inheritance could not go to them, but to the defendant. The defendant was in possession of Tukaram's property as his heir and the plaintiff had no right to sue as the assignee of Tai and Salau, who had no right to Tukaram's estate.

The Subordinate Judge rejected the claim, holding that the defendant had a preferential title to Tukaram's estate, and not the plaintiff.

On appeal by the plaintiff the Judge confirmed the decree.

The plaintiff preferred a second appeal.

Mahadeo B. Chaubal, for the appellant (plaintiff):—The last holder was Tukaram's mother Rakhmau. Therefore we contend that succession must be traced to her husband Kushaji and not to the last male holder. If our contention is correct, then Salau and Tai, being the sisters of Kushaji, would be entitled to inherit the property. We further contend that for the purpose of succession Rakhmau must be treated as a male: Manilal v Bai Rewa. (1) Even if succession be traced to the last male holder, that is, to Tukaram, the father's sister would have a preferential right to that of a distant relative. According to the Mayukha, a

GANESII O. WAUHU. sister is a sagotra sapinda, and that being so, the father's sister would stand on the same level.

Krishnaji H. Kelkar, for the respondent (defendant):—On Tukaram's death his mother took only a widow's estate: Narsappa v. Sakharam (1); Sakharam v. Situbai); Bharmangarda v. Rudrapgarda (3); Tuljaram v. Mathuradus. (4) The distinctive feature of a widow's estate is that, after her death, the succession is to be traced to the last male holder: Bhugwandeen v. Myna Buee (5); Collector of Masulipatam v. Cavaly Vencata. (6)

The next question is whether a father's sister is a sagotra sapinda. In the Bombay Presidency a sister is admitted as an heir, not because she is sagotra sapinda according to the Mitakshara, but because she is mentioned as an heir in Nilakantha's Commentary on account of her propinguity to the last male holder, her brother. The doctrine cannot be extended to the father's sister. This point was raised and decided in Second Appeal No. 158 of 1870, which was a case from Gujarát, and therefore governed by the Mayukha. Vijnaneshvar, the author of the Mitakshara, does not mention the father's sister as a sagotra sapinda. She does not appear in the Subodhini or in the Viramitrodaya. Possibly she is not even a bandhu. enumeration of bandhus in the Mitakshara, however, has been held by the Privy Council to be illustrative and not exhaustive: Muthusami Mudaliyar v. Simambedu. (7) She is treated as a bandhu in the Madras Presidency: Narasimma v. Mangammal (8). Chinnammal v. Venkatachala.(9)

JENKINS, C. J.:—The question arising on this appeal is, whether the appellant should be preferred to the respondent as heir to the property in suit? The relationship of the parties is shown in the tabular statement contained in the judgment of the first Court. On Tukaram's death, about thirty years ago, he was succeeded by his widow, but on her remarriage the property passed to Tukaram's mother who has now died.

^{(1) (1869) 6} Bom. H. C. R. 215.

^{(2) (1879) 3} Bom. 353.

^{(3) (1879) 4} Bom, 181.

^{(4) (1881) 5} Boin, 662,

^{(5) (1867) 11} Moore's I. A. 487.

^{(6) (1861)} S Moore's I. A. 529.

^{(7) (1893) 19} Mad. 405.

⁽s) (1889) 13 Mad. 10.

^{(9) (1891) 15} Mad. 421.

The present claimants are the appellant who derives title under Tai and Salau on the one hand, and Waghu, who is the grandson of Mahadaji.

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In the first place it was contended that on Tukaram's mother's death succession ought to be traced to Kushaji, her husband.

The purpose of this argument was to take advantage of the rule in this Presidency which assigns a high place in the order of succession to the sister. We are, however, of opinion that the point is covered by authority and that the heir of Tukaram is the person to succeed. The question therefore resolves itself into this: is the paternal aunt or the paternal great-grand-father's grandson to be preferred? Both the lower Courts have decided against the aunt.

Now there is no doubt that the great-grandfather's grandson is a sagotra sapinda. Mr. Chaubal contends that the same, or as good a qualification, is possessed by the aunt, and he is forced so to contend; for he concedes that if she be bhinna gotra supinda or bandhu, she cannot succeed unless, by reason of the parties being Sudras, it can be said gotra is not a determining factor. Now an aunt by marriage, becomes of another gotra. Reliance is, however, placed on the text of the Vyavahar Mayukha, which deals with a sister's succession (IV, viii, 19). In the record of Second Appeal No. 158 of 1870 we have the following translation of this passage:

"In her (father's mother's) absence the sister. For Manu says—that among sapindas to the nearest the inheritance belongs, Brahaspati (also) says where there are many caste-fellows and bandhus of the same family (Sakulya), among them, the nearest takes the wealth of the childless deceased. And because of her also having been born in the gotra of the brother, there is the identity of gotratva (state of belonging to the gotra). Only she has no sagotratva (evenness of gotra) (with the brother). Sagotratva (however) is not stated as the cause (occasion) of vesting the inheritance."

The same reasoning, it is urged, is applicable to the paternal aunt.

In Second Appeal No. 158 of 1870 it was decided that the father's sister even in Gujarát was not entitled to come in at the head of

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GANESH O. Wachu. the gotraja sapindas, and she was postponed to distant male gotraja sapindas. Here then we have the decision of a bench of this Court more than thirty years old on a point of property law which governs this case, and we think that in the absence of strong reasons it would be wrong for us not to treat ourselves as bound by it; for in property law the principle of stare decisis must have the greatest weight ascribed to it. Therefore we hold that the paternal grandfather's grandson is to be preferred to the paternal aunt, and we think it should make no difference in this respect that the parties are Sudras. The decree of the lower Appellate Court must therefore be confirmed with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Jacob.

1903. July 14. RAMCHANDRA VINAYAK KULKARNI AND OTHERS (ORIGINAL PLAINT-IFFS), APPELLANTS, v. NARAYAN BAJAJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.**

Limitation Act (XV of 1877), schedule II, article 118—Adoption—Declaration that the adoption is invalid—Knowledge—Death of adopter—Date from which limitation runs.

B adopted N on the 17th March, 1891. On the 30th March, 1897, B died. The plaintiffs filed this suit on the 14th April, 1899, for a declaration that the adoption of N was invalid.

Held, that the suit not having been brought within six years from the 17th March, 1891, the date on which the plaintiffs came to know of the adoption, was barred under article 118 of schedule II to the Limitation Act (XV of 1877); and that the fact that B died within six years of the date of the suit could not prevent the bar of limitation.

SECOND appeal from the decision of Gangadhar V. Limaye, First Class Subordinate Judge, A. P., at Poona, confirming the decree passed by K. R. Jalihal, Subordinate Judge of Khed.

Suit for a declaration that an adoption is invalid.

One Bajaji adopted Narayan (defendant 1) on the 17th March, 1891: on the same day this fact came to the knowledge of the plaintiffs who were reversionary heirs of Bajaji.

^{*} Second Appeal No. 35 of 1903.

Bajaji died on the 30th March 1897.

On the 14th April, 1899, plaintiffs filed this suit to obtain a declaration that the adoption of defendant 1 was invalid.

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The suit was dismissed by both the lower Courts on the ground that it was barred under article 118 of schedule II of the Limitation Act (XV of 1877), as it was not brought within six years from 17th March, 1891, the date on which defendant 1 was adopted and on which plaintiffs came to know of the adoption.

The plaintiffs appealed to the High Court.

M. V. Bhat, for the appellants:—Our suit is to be declared reversionary heirs of Bajaji's estate on the death of his widow Bhimabai, as against defendant 1 who claims as adopted son of Bajaji. Bajaji died in 1897, and name of defendant 1 was substituted in place of Bajaji's name in the Government records on the 11th February, 1899. We contend that the cause of action accrued to us either on the death of Bajaji or on the date when defendant 1's name was entered in place of Bajaji's in Government records. Our rights to be entered as reversionary heirs were not interferred with as long as Bajaji was alive. We can get the declaration we seek without challenging the adoption of defendant 1 by Bajaji during his life-time. We submit defendant I was not entitled to deny our title as reversioners immediately he was adopted, as our title was to come into existence only on Bhimabai's death. The case of Shrinivas v. Hanmant (1) has no application here. The ratio decidendi of Gangabai v. Tarabai (2) governs this case.

G. N. Nadkarni, for the respondents:—The plaintiffs would have been the next reversioners after Bhimabai's death only if there had been no adoption. By adopting defendant I Bajaji created a joint owner with him during his life-time. He was entitled to deny plaintiffs' title as reversioners as soon as he entered Bajaji's family by adoption. The plaintiffs could, therefore, have brought a suit even during the life-time of Bajaji to have the adoption set aside. The case of Shrinivas v. Hanmant (1) governs this case.

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CHANDAVARKAR, J.:—The point of law which arises in this case is, whether this suit to set aside the adoption of defendant 1 is barred under article 118 of the Limitation Act, and falls within the principle of the Full Bench ruling of this Court in Shrinivas v. Hanmant.(1)

The facts are shortly these. One Bajaji who was entitled to certain watan property adopted on the 17th March, 1891, defendant I who was his daughter's son. Bajaji died on the 30th March, 1897. The plaintiffs brought this suit in 1899 for a declaration that the adoption of defendant 1 by Bajaji was invalid. Both the lower Courts have dismissed the suit on the ground that it ought to have been brought within six years from the date when the plaintiffs came to know of the adoption.

It is contended before us that the period of limitation of six years prescribed by article 118, Limitation Act, cannot apply to the facts of the present case, because the adoption having been made by Bajaji himself, defendant 1 did not become entitled to any property until Bajaji's death, and that it was upon the happening of that event. i.e., Bajaji's death, and not before, that a cause of action accrued to the plaintiff to contest the validity of the adoption. The suit is within six years from the date of Bajaji's death.

The question, therefore, is whether the plaintiffs could have attacked, and if they could, whether they were bound to attack, the adoption during Bajaji's life-time?

The argument for the appellants (plaintiffs) before us assumes that a person cannot contest an adoption in a Court unless the adopted person sets up a right to property. That argument, however, is answered by the fact that the Legislature have, as pointed out by Westropp, J., in Kalora v. Panapa², distinctly recognized the right of a person to bring a suit to set aside an adoption as a substantive proceeding independent of any claim to property by fixing a special Court-fee for such a suit and providing a special period for it in the Limitation Act. But it is urged, though such a suit could have been brought, it could only have been brought by some person entitled to dispute the

adoption, whereas the plaintiffs could claim no such title during Bajaji's life-time. But the answer to that is that the plaintiffs filled the character of apparent reve sioners when Bajaji made the adoption as much as they fill it now. It is beyond doubt that had Bajaji died without making an adoption, and had his widow adopted a boy, the plaintiffs as presumptive reversioners could have sued to set it aside. The fact that Bajaji made the adoption himself can make no difference as to the plaintiffs' title as presumptive reversioners when he was alive.

Section 42 of the Specific Relief Act says that any person entitled to any legal character may institute a suit against any person denying his title to such character. Now, what were the circumstances when Bajaji adopted defendant 1? Bajaji had no issue except daughters. The daughters could not, according to law, become entitled to the watan property on his death. Therefore, in the absence of any adoption, the property on Bajaji's death would have gone to the widow first and to the plaintiffs as reversioners after the widow's death. There was the chance of the widow predeceasing Bajaji and the plaintiffs becoming entitled to the property on Bajaji's death. It may therefore be taken that the plaintiffs during Bajaji's life-time were prima facie clothed with the legal character of apparent reversioners, and they could have brought a suit against defendant 1, attacking his adoption, because the moment defendant 1 was adopted he became Bajaji's heir interested in denying the title of the plaintiffs to succeed Bajaji as reversioners. It is true there was no immediate injury to this status of apparent reversioners which the plaintiffs held, but that could not affect the question whether a suit for a decaration that the adoption was invalid could lie at their instance during Bajaji's life-time. "A wrong, though its practical effects are wholly in the future, still gives a claim to relief, and that claim cannot be met by an allegation of no immediate palpable injury." Per West, J., in Ramchandra v. Anant. (1) It follows from this that the plaintiffs could have maintained a suit against defendant I for a declaration that his adoption was invalid. If they could, the case falls within the

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principle of the Full Bench ruling in Shrinivas v. Hanmant (1) and the plaintiffs were bound to bring the suit under article 118 of the Limitation Act within six years from the time when the adoption of defendant I became known to them. The fact that the Legislature has prescribed that the period of limitation for such a suit should run from the time when the adoption becomes known to the person contesting it and not from the time when the adopted boy succeeds to the property of his adoptive father is decisive of the question of limitation and supports the view taken by the lower Courts in this case. The same view was taken by Davies, J., in Parvathi v. Saminatha. (2)

For these reasons we confirm the decree of the lower Appellate Court with costs.

Decree confirmed.

(1) (1899) 24 Bom. 260.

(2) (1896) 20 Mad. 40,

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Jacob.

THE AHMEDABAD MUNICIPALITY (ORIGINAL PLAINTIFF), APPEL-LANT, v. SULEMANJI ISMALJI (ORIGINAL DEFENDANT), RESPONDENT.*

Municipality—Bombay District Municipal Act Amendment Act (Bom. Act II of 1884), section 30 (1)—Executory contract—Breach—Binding character—Suit for damages.

In a suit for damages for breach of an executory contract, it is open to the defendant to show that it is not binding on him inasmuch as it is not binding on the plaintiff.

* Second Appeal No. 588 of 1902.

Every other contract or agreement on behalf of a Municipality shall be in writing and shall be signed by the President and by two other Commissioners and shall be sealed with the common seal of the Municipality.

No contract or agreement not executed as in this section provided shall be binding on a Municipality,

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⁽¹⁾ Section 30 of the Bombay District Municipal Act Amendment Act (Bom. Act II of 1884):

^{30.} The President of a Municipality may, on behalf of the Municipality, enter into any contract or agreement in such manner and form as, according to the law for the time being in force, would bind him if such contract or agreement were on his own behalf; provided that the amount or value of such contract or agreement shall not exceed five hundred rupees.

SECOND appeal from the decision of Lalshankar U. Trivedi, Additional First Class Subordinate Judge of Ahmedabad, with Appellate Powers, reversing the decree of Vadilal T. Parikh, Joint Subordinate Judge.

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Suit to recover damages for breach of an executory contract, The plaintiff Municipality on the 23rd September, 1899, advertised an auction to be held on the 5th October, 1899, of a contract to supply firewood to the Water-works at Ahmedabad for one year commencing from the 1st December, 1899. At the auction-sale the defendant offered to take for Rs. 14,850 the contract to supply firewood for one year commencing from the 1st December, 1899, and signed the lilam yádi (memorandum of auction-sale). As the amount involved was more than Rs. 500. the General Committee of the Municipality had to sanction the auction under section 30 of the District Municipal Act Amendment Act (Bom. Act II of 1884). The Sanitary Committee. therefore, submitted the defendant's proposal for the acceptance of the General Committee on the 5th October, 1899. The defendant on the 16th October, 1899, wrote to the Secretary of the Municipality that he was given to understand that the sanction of the General Committee would be obtained within a week from the date of the auction and that he should be informed of the acceptance of his offer within two days to enable him to fulfil the contract. The Secretary replied on the 25th October, 1899, that the business of the contract would be placed before the general meeting at the end of the month. The general meeting was held on the 27th October, 1899, when it directed the Sanitary Committee to make further inquiry as to more favourable terms. The Sanitary Committee then held another auction on the 13th November, 1899, for the supply of firewood up to the 1st January, 1900. One Popat took the contract and agreed to supply fuel on receipt of Rs. 37 daily. The defendant's rate was about Rs. 41 per day. The Sanitary Committee by their report, however, informed the General Committee that terms proposed by the defendant for one year's contract were quite reasonable and the General Committee having, thereupon. sanctioned the defendant's terms, the plaintiff on the night of the 30th November, 1899, informed the defendant by a telegram that

Aumedabad Munici-Pality v, Sulemanji. his offer was accepted and a letter also was sent to him to the same effect. The letter reached the defendant on the 2nd December, 1899. On the 5th December, 1899, the defendant wrote a letter to the plaintiff in the following terms:—

I have received from you an yadi (i.e., memorandum). . dated the 30th November, 1899. In reply to the same I have to write as follows: I do not agree to what you write about the contract for the supply of 'Kathi' (i.e., fuel) at the Water-works. I had in connection with the said contract for the supply of 'Ka'hi' (fuel) caused inquiries to be made at your place. In reply to the same Ráo Sáheb Pranjivandas, Secretary (of the Municipality), wrote to me in his letter dated the 25th October, 1899, that the said matter has been (would be) placed before (a meeting of) the General Committee (to be held) on date the 27th October, 1899, (for them) to approve the contract. I, therefore, got my men Aldul Husen Chui and Sha khbhai to be present on my behalf on that day at the time when (the meeting of) the Committee was held. And on that day the General Committee did not approve of my contract and the Municipal Secretary and the other Commissioner sahebs informed my men who were present (there) of the same and said to them as follows :- Your contract has not been approved of. You are, therefore, free. Thus ended the conversation between the Municipality and me in connection with the contract. Nearly a month thereafter you now send me another notice about the contract having been approved of. I do not agree to the same. And the approval of the Municipality without an offer on my part is of no use. I am not, therefore, going to supply 'Kathi' (fuel) and am not bound to supply the 'Kathi' (fuel). May the same be known to you .

In the year 1000 the plaintiff sued to recover Rs. 1,685 from the defendant as damages for breach of the contract. The sum claimed represented the difference which the plaintiff had to pay to other contractors over and above the amount of Rs. 14,850 for which the defendant had offered to take the contract on the 5th October, 1899.

The defendant answered, inter alia, that the contract was broken by the plaintiff and not by him (defendant); that the plaintiff attempted to enter into new contracts with other persons at lower rates and when none was found to accept the contract at a lower rate, the contract in suit was sanctioned by the General Committee on the 30th November, 1899, and he was informed of the same at Godhra by a telegram at 11 P. M. of the same day; that it was, therefore, impossible for him to fulfil the contract from the 1st December, 1899, at Ahmedabad; that on the

2nd December, 1899, he got a letter from the plaintiff; that on the 13th November, 1899, the plaintiff made a contract with another person for the month of December at a lower rate; that the plaintiff also entered into a contract with a third person for the month of January, 1900, at a lower rate; that the rate of firewood having subsequently risen, the plaintiff unjustly brought the present suit, and that if the General Committee had sanctioned the defendant's contract at an earlier date, he (defendant) would have been in a position to fulfil the contract.

The Subordinate Judge found that the defendant had broken the contract in suit and he awarded to the plaintiff the amount claimed as damages for breach of the contract.

On appeal by the defendant the Judge reversed the decree and dismissed the suit on the following among other grounds:—

It is undisputed that defendant lives at Godhra. On the night of the 30th November, 1899, plaintiff sent a telegram to defendant at Godhra and on 1st December a registered letter was sent to him. . . It is beyond doubt that defendant got the information about the acceptance at about midnight preceding 1st December, 1899. It was physically impossible for defendant to be present at Ahmedabad on 1st December to fulfil the terms of the contract. Under section 6 (2) of the Contract Act (Act 1X of 1872), the defendant's proposal should be considered to have been revoked, particularly when plaintiff gave contract for December, 1899, to Popat on 13 h November, 1899. I therefore hold that there was no contract binding on defendant and that under the above circumstances of the ease plaintiff is not entitled to any damages.

The plaintiff preferred a second appeal.

Lallubhai A. Shuk, for the appellant (plaintiff).

Gokuldas K. Parekh, for the respondent (defendant).

JENKINS, C. J.:—We affirm the decree of the lower Appellate Court on the ground that as this suit is brought by the Municipality for breach of an executory contract, it is open to the defendant to show that it is not binding on him inasmuch as it is not binding on the plaintiff. It is not binding on the plaintiff because the formalities prescribed by section 30 of the Bombay District Municipal Act Amendment Act, 1884, have not been complied with. The appellant must pay the costs of this appeal.

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APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Jacob.

1903. July 16. DAMODAR SHALIGRAM, DECREE-HOLDER, v. SONAJI, JUDGMENT-DEBTOR.*

Limitation Act (XV of 1877), schedule II, article 179 (5)—Civil Procedure Code (Act XIV of 1882), section 248—Decree—Execution—Notice to show cause why decree should not be executed—Date of the order—Step in aid of execution.

Where a notice to show cause why a decree should not be executed is issued under section 248 of the Civil Procedure Code (Act XIV of 1882), the time provided for by article 179 (5) of the Limitation Act (XV of 1877) runs from the date of the order directing the same: actual service of the notice is not necessary.

REFERENCE by R. D. Nagarkar, Subordinate Judge of Yeola in the Násik District, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The facts were as follows:-

On the 2nd June, 1897, the plaintiff, Damodar Shaligram, obtained a money decree in his favour in a suit cognizable by a Court of Small Causes. Subsequently on the 9th June, 1903, he applied to the Subordinate Judge's Court at Yeola in its Small Cause jurisdiction for the execution of the decree. The application was made three years after the previous application for execution which was presented on the 30th May. 1900, and a question having arisen as to whether it was barred under clause (4), article 179, schedule II of the Limitation Act (XV of 1877), the plaintiff contended that clause (5) of the article was applicable and the application was not time-barred, inasmuch as a notice under section 248 of the Civil Procedure Code (Act XIV of 1882) had been prepared and sent for service on the defendant sometime after the 9th June, 1900, on the application of the 30th May, 1900.

The record of the case showed that the Court-fee for a notice under section 248 of the Civil Procedure Code was paid on the 8th June, 1900, and a notice was prepared on or after the 9th June, 1900. This notice was sent to the Názir of the Court for service.

but it was returned unserved. There was no evidence before the Court showing that though the notice was not served, the defendant was aware aliundee of the fact that a notice under section 248 was prepared and sent for service upon him under the orders of the Court.

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The Subordinate Judge having entertained a doubt on the point, he submitted the following question:—

Whether a notice prepared under section 248 and sent to the Názir for service upon a judgment-debtor but not actually served upon him, in the absence of evidence to show that the judgment-debtor had knowledge of the fact of preparation and transmission for service to the Názir, amounts to "issuing a notice" under clause 5, article 179 of schedule II of the Limitation Act?

The opinion of the Subordinate Judge was in the negative for the following reasons:—

As remarked in the commentary under section 248 in Suntoke's Civil Procedure Code, Edition of 1898:- "A notice issued under section 248 calling upon the judgment-debtor to show cause why execution should not issue against him is called a notice for revival or renewal of judgment because under the Limitation Act, article 179, clause 5, the decree-holder gets a fresh period of limitation from the date of issuing such notice. The issuing of this notice is not a mere formality, but a condition precedent to the valid execution of a decree in cases falling under clause (a) or (b) of section 248: Gopal Chunder v. Gunamoni. (1) " Proceedings in execution without such notice having been given were held to be void and of no effect whether the auction-purchaser was the decree-holder or a third party: Sahdeo v. Ghasiram. 2) In the former of these cases Beverley, J., remarked: -- "Having regard to the provisions of sections 248, 249 and 250 of the Code of Civil Procedure, it seems to me clear that until notice is issued on the legal representative of the judgment-debtor, the Court has no jurisdiction to issue its warrant for the execution of the decree." In the same case Norris, J., remarked :- "The issuing of the notice required by section 248 of the Code of Civil Procedure is a condition precedent to the execution of the decree against the representative of the deceased judgment-debtor." This case arose under section 248, clause (b), but no distinction is made in the Code or in any of the cases that have come to my notice between this clause and clause (a) under which the present application for execution falls as regards the effect of the notice prescribed in this section. The point is not discussed in Hari Ganesh v. Yamunabai, (8) which is a case falling under clause 5 of article 179 of the Limitation Act. The case at I. L. R. 3 Cal. 518 refers to a notice under section 248 which was served on the judgment-debtor.

DAMODAR V. SONAJI. Section 249 of the Civil Procedure Code runs thus :-

"If the person to whom notice is issued under the last preceding section (248) does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed."

"If he offers any objection to the enforcement of the decree, the Court shall consider such objection and pass such order as it thinks fit."

No question can arise as to the person to whom notice is issued not appearing or not showing cause unless the notice is served upon him. The only notice which this section contemplates is, I think, a notice served upon the party against whom it is issued. The notice contemplated in section 248 is, I believe, the same, namely, a notice served upon the party against whom execution is applied for. The term "issuing notice" in clause 5 of article 179, schedule II, of the Limitation Act, is obviously used in the same sense which it bears in The term is probably sections 248 and 2.9 of the Civil Procedure Code. borrowed in the Limitation Act which is a later enactment from the Code of Civil Procedure (Act X of 1877), for section 248 of the Civil Procedure Code is specifically mentioned in clause 5, article 179, of the Limitation Act. If the term "issuing a notice" includes its service, as I think it does, then a notice prepared for the purpose of section 248 will be ineffectual to keep a decree alive unless it is actually served upon the judgment debtor, or unless the judgment-debtor is otherwise aware that such a notice was prepared and handed over to the Názir for service upon him.

The practice in some Subordinate Courts is to regard the date of preparation of the notice under section 248 irrespective of its service as equivalent to date of issue of such notice for the purpose of clause 5 of article 179 of the Limitation Act. I am not able to find any ruling of the Bombay High Court dealing with this question which is of great importance in determining questions of limitation under the above clause 5 that frequently occur.

I entertain a r asonable doub upon the point considering the practice abovementioned that previls in some Courts, and have therefore of my own motion submitted it for the decision of the Honourable the High Court.

The importance and effect given to the notice under section 248 requires that the notice should be one served upon a party and not one which is returned unserved. It is called a notice for revival of judgment probably under a fiction that the service of notice gives to a judgment-debtor from its date as much knowledge of the judgment as if a new judgment was passed against him. On general considerations also the Legislature could hardly have meant by the words "the Court shall issue notice" used in section 248 of the Civil Procedure Code, a notice not served; for a notice not served or not known to the judgment-debtor is practically no notice at all. In the Select Committee's Report, lately published, on a Bill for the amendment of the Code of Civil Procedure, now before the Legislative Council of the Government of India, in clause 248 (j), paragraph 1, provision is made for setting aside an order passed ex-parts "after notice to a judgment-debtor." This refers to a notice under section 248 and contemplates a notice served. The term "issue of a notice" is not altered

apparently because it has been understood that the issue of a notice includes its service and not merely its preparation and despatch for service, in cases in which it has not been served.

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The present application for execution being made to a Court invested with the jurisdiction of the Court of Small Causes in a suit which is cognizable exclusively by such Court, no appeal lies from an order that may be passed by the Court in execution, the order being final.

Dattatraya W. Pil·laumkar (amicus curice), for the decree-holder (plaintiff):—Notice need not be served. The expression "issuing notice" in clause (5), article 179, schedule II, of the Limitation Act, means the date on which the order directing the issue of notice is passed by the Court: Udit Narain v. Rumpurtap Singh. Section 243 of the Civil Procedure Code deals with the manner of the execution of the decree. It has nothing to do with limitation: Bimola Soondurree v. Kalee Kishen. (2)

Krishnaji H Kelkar (umicus curiæ), for the judgment-debtor (defendant):—We rely on Ruj Buliub Shaha v. Gossain Dass Shaha, (3) which shows that the notice must be served on the defendant.

JENKINS, C. J.:—In our opinion actual service is not necessary. But where notice has issued, time runs from the date of the order directing the same under section 248, Civil Procedure Code (XIV of 1882). This case must be determined by reference to that date.

(1) (1881) Weekly Notes, All. 120. (2) (1874) 22 Cal. W. R. 5. (3) (1870) 13 Cal. W. R. 400.

THE INDIAN LAW REPORTS. [VOL. XXVII. APPELLATE CRIMINAL.

Before Mr. Justice Chandavarkar and Mr. Justice Jacob.

1903. July 20.

EMPEROR v. WAMAN SHIVRAM DAMLE.*

Charge to jury—Sessions Judge—Misdirection—Inadmissible evidence— Criminal Procedure Code (Act V of 1898), sections 418, 423 (2).

Where a charge to the jury by the Sessions Judge is, upon the whole, favourable to the accused, and most of the points of importance in favour of accused are more or less dealt with in the charge, the mere fact that some of the points are not so amplified as they might have been does not amount to a misdirection.

Before the High Court can interfere with the verdict of a jury on the ground that the evidence of accused's confession was wrongly admitted, it must be satisfied, firstly, that the verdict is erroneous; secondly, that the erroneousness was caused either by the Judge's misdirection to the jury as to that evidence or by a misunderstanding on their part of the law as to it as laid down by the Judge.

Where material evidence which ought not to be admitted is admitted and the jury are placed in possession of it, there is an error in law in the trial under section 418 of the Criminal Procedure Code (Act V of 1898), and there is a misdirectoin of law when the Judge tells the jury that it is evidence which they can consider and on which they can, if they think proper, convict the accused. The fact that after putting the jury in possession of the inadmissible evidence the Judge in his charge goes on also to point out circumstances which would justify the jury in disbelieving the wrongly admitted evidence does not make the misdirection less a misdirection.

Where evidence which the law says shall not be admitted is let in with other evidence legally admissible, and where the former is of a material character, it would be mere speculative refinement to hold that the jury must have, in convicting the accused, relied upon the latter and rejected the former.

Appeal from convictions and sentences passed by L. C. Crump, Sessions Judge of Belgaum.

The accused, twelve in number, were convicted of the offence of forgery of the will of one Lakshman Keshav Damle under section 467 of the Indian Penal Code (Act XLV of 1860), and sentenced each to undergo rigorous imprisonment for five years, and accused No. 1 was sentenced to an additional term of two years' rigorous imprisonment on the charge of using the forged will as genuine under section 471 of the Code.

Lakshman Keshav Damle was a wealthy money-lender of Khánápur. He had one son Ganpatrao who died in 1900, leaving behind him a widow named Jankibai and a minor son Bandhu. Besides these persons, Lakshman's wife Chimabai was alive and living with him and also his natural brother Waman

Shivram (accused 1).

Waman Shivram was by birth Lakshman's brother, but had been some years before adopted by Lakshmibai, the widow of one Shivram Damle, a near relative of Lakshman's father.

At the date of Lakshman's death, Jankibai was living at Miraj with her parents and her son Bandhu was with her.

In 1901 there was an epidemic of plague in Khánápur. On the 10th January, 1901, Lakshman fell ill. The following day unmistakeable symptoms of plague appeared and on the night of the 13th January, 1901, he died. Shortly after Lakshman's death, Jankibai and her relatives from Miraj appeared on the scene. Chimabai at that time was seriously ill with plague. Some disputes seemed to have arisen, and on the 15th January, 1901, a number of persons, including the majority of the accused, collected at Lakshman's house, and there was a panch held with the object of arriving at some settlement. After this incident of the panch, Chimabai, Jankibai, Datto Gopal (Jankibai's uncle), and Waman (accused 1) continued to live in Lakshman's house until Chimabai's death on the 19th January, 1901.

On the 28th January, 1901, Datto Gopal applied to the Mamlatdar who appeared on the scene. It was asserted before the Mamlatdar that the will was a forgery. The Mamlatdar made a kind of summary enquiry, recorded certain statements, and made a report in favour of the genuineness of the will put forward by Waman, as Lakshman's last will. This will, it was contended by the defence, was written on the day it bore date (10th January, 1901). It was contended by the prosecution that the will was a forgery, having been prepared on the 26th January, 1901, several days after Lakshman's death.

Datto Gopal next applied to the District Court of Belgaum, on behalf of Jankibai, for a temporary appointment of guardian to the estate of the minor; and pending a regular decision, the District Judge, on the 31st January, 1901, passed a temporary

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1003, EMPEROR O. WAMAN. order appointing Mr. Varadaraj, the then Názir of the Court, temporary guardian. A notice was issued to accused 1 who, on the 5th February, 1901, put in an application asking that the temporary order of attachment should be set aside. This application was rejected. The date fixed for hearing the regular application was 15th March, 1901. Accused 1 obtained a post-ponement to the 14th June, 1901. Before this date there had been negotiations between the parties, and the hearing was postponed with a view to an amicable settlement.

On the 19th June, 1901, the parties appointed four arbitrators. The award was made but was not signed; and the matter came again before the District Court.

On the 19th July, 1901, the District Judge proceeded to hear Jankibai's application. Waman opposed it on the ground that there was a will made by Lakshman which appointed him guardian. The result of the enquiry was that on the 20th July, 1901, the District Judge appointed the Nazir guardian of the property and Jankibai guardian of the person.

On the 8th November, 1901, the Názir, Mr. Varadaraj, moved the District Court to sanction the prosecution of the persons making or attesting the will. Mr. Varadaraj died on the 18th December, 1901. The application for sanction was renewed on the 24th June, 1902, and the District Judge granted the sanction on the 26th July, 1902.

In August, 1902, the present proceedings commenced.

The following are the extracts from the heads of charge by the Sessions Judge to the jury:—

"Statement said to have been made by accused 1 to the Názir inadmissible against the other accused as being a confession of an offence for which they are not being tried. At most a confession not of forgery but of using as genuine a forged document. The other accused are not being tried for the latter offence. Also salf-exculpatory and therefore inadmissible against them. Does not implicate himself to the same degree as them. Do you believe that as a matter of fact that statement was made? Persons do not confess without some reason. What reason was there? The case was fixed for hearing on the 19th July, 1901. And to all appearances Waman was prepared to go on with it. If, as he suggested, he wished to compromise the matter, it was wholly unnecessary for him to implicate himself in this way. He could merely have agreed not to press his claim under the will. Mr. Manerikar's evidence important in this connection. Does not this suggest that the Názir suggested that Waman should confess

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and compromise the matter, and that the Názir then assumed that his own suggestion represented Waman's statement? If this confession was made, why did Mr. Varadaraj wait for four months before taking any steps to obtain sanction to prosecute? It is true that Waman denied ever having been to the Názir at all, but is it not reasonably possible that he was taken by surprise at this unexpected statement, and foolishly denied that any interview took place? The whole matter rests on the uncorroborated testimony of a dead man, and without having him before the Court some caution is necessary in accepting his statement.

(5) The conduct of accused No. 1 with reference to certain property.

Prosecution perfectly entitled to prove conduct of accused No. 1 if such conduct is inconsistent with the existence of a will."

The accused appealed to the High Court.

Branson and Robertson, with Nilkantha Atmaram, for the accused.

The Advocate-General, with the Government Pleader, for the Crown.

CHANDAVARKAR, J.:- The unanimous verdict of the jury, finding the accused guilty in this case, has been accepted by the Judge, and, in accordance with it, he has sentenced accused Nos. I to 12 to five years' rigorous imprisonment on the charge of forgery of a will under section 467, Indian Penal Code, and accused No. 1 to an additional term of two years' rigorous imprisonment on the charge of using as genuine a forged document under section 471, Indian Penal Code. In this appeal against the convictions and sentences, the learned counsel for the appellants, relying on Emperor v. Malgowda Basgowda, (1) has contended that there was misdirection in the learned Judge's charge to the jury, because, it is urged, he omitted to call the attention of the jury to several matters of prime importance which favoured the accused. It is conceded that the Judge's charge was, upon the whole, favourable to the accused, and we think that he summed up the case most carefully and fairly. Most of the arguments urged in support of the appeal before us amount practically to this, that the learned Sessions Judge did not put the points referred to in the heads of charge in greater detail. Most of the points of importance urged by the learned counsel for the appellants have been more

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or less dealt with in the charge, and the mere fact that some of the points were not amplified as they might have been does not, in our opinion, amount to a misdirection.

There are three objections, however, urged in support of this appeal, which stand upon a different footing. They may be

formulated as follows:-

(1) Exhibit 58, the deposition of the deceased Názir recorded in a civil proceeding, was wrongly admitted in evidence under section 33 of the Evidence Act as containing accused No. 1's confession.

(2) The Judge put before the jury the evidence of accused No. I's conduct as if the jury could, if they chose, draw an

inference from it against all the accused.

(3) The Judge omitted to place before the jury the evidence as to the alleged signature of Lakshman on the will, Exhibit 8, which told in favour of its genuineness and which stood uncontradicted.

As to the first of these objections, the learned Advocate-General, who has appeared for the Crown to support the convictions, has not contended that Exhibit 58 was admissible in evidence either under section 33 or any other provision of the Evidence Act. Exhibit 58 is a statement made by the deceased Nazir of the District Court of Belgaum in Miscellaneous Application No. 8 of 1901 and was tendered by the prosecution for the purpose of proving an admission or confession alleged to have been made by accused No. 1 to the Nazir. Its admissibility was objected to by the defence in the Sessions Court, but the Judge overruled the objection, holding that "the statement may be proved under section 33 of the Evidence Act, and is admissible as an extrajudicial confession against accused No. 1." But the Sessions Judge omitted to notice the important proviso to section 33, according to which evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding only if the parties to both the proceedings are the same. Neither the Crown nor the Názir now prosecuting the accused were parties to the Miscellaneous Application in which the deceased Nazir made the statement. The argument of the learned Advocate-General is that, though the statement was wrongly admitted, that is not a valid ground for setting aside the verdict of the jury, if as a matter of fact it could not have influenced the jury, and that it

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did not influence the jury is apparent from the fact that the Judge in his charge was emphatic in telling them that they ought not to believe the statement of the deceased Názir. It is indeed the case that the Judge in his summing up told the jury firstly, that the alleged confession said to have been made by accused No. 1 to the Názir was not admissible as against the other accused, because it was "at most a confession not of forgery but of using as genuine a forged document," for which latter offence those other accused were not being tried, and also because it was "self-exculpatory," inasmuch as it did not implicate himself to the same extent as it did the other accused; and secondly, that it was highly improbable that accused No. 1 made the alleged admission or confession to the Názir and the whole matter rested "on the uncorroborated testimony of a dead man, and without having him before the Court some caution is necessary in accepting his statement." So far the summing up was favourable to the accused; but the fact stands that the statement was allowed to go in as part of the evidence which the jury could consider, and it is contended by the appellants' counsel that when evidence which ought not to be placed before the jury is placed before them, and they are left to believe it or not, and the evidence so let in is material in the sense that, if believed, it must tell against the accused, it is difficult to say that they have not been influenced by it when, in spite of the Judge's charge that the evidence in question was not entitled to belief, they have brought in a verdict of guilty against the accused. law on this point was carefully considered by Melvill, J., in Reg. v. Rimswami Mudliar.(1) After observing that it is not the admission of every inadmissible evidence which vitiates a trial by jury, that learned Judge went on to say. . . . "The duty of the Appellate Court is, in my opinion, first to consider whether the evidence improperly admitted is material, and such as is likely to have exercised a prejudicial influence on the minds of the jury. If it be so, then, as it is impossible to know the exact amount of weight which the jury attached to the particular evidence in question, their verdict is so far invalidated that the Appellate Court cannot any longer accept it as a conclusive decision on the

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facts. . . . If the Appellate Court think that the verdict of the jury is founded, in part, upon evidence which should not have been admitted, or that the appellant has been prejudiced by some misdirection or omission of proper direction on the part of the Judge, the Appellate Court is at liberty to treat the case as if it had been tried by the Judge with the aid of assessors." This was under the Code of Criminal Procedure in force in 1869. The question is whether it is the law also under the Code of Cri-According to section 418 of the minal Procedure now in force. present Criminal Procedure Code, where the trial was by jury, an appeal shall lie on a matter of law only; and according to clause (2) of section 423, the Appellate Court cannot alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him. Reading these two sections together, it is clear that before we can interfere with the verdict in this case on the ground that the evidence of accused 1's confession was wrongly admitted, we must be satisfied, firstly, that the verdict is erroneous; secondly, that the erroneousness was caused either by the Judge's misdirection to the jury as to that evidence or by a misunderstanding on their part of the law as to it as laid down by the Judge. Where material evidence which ought not to be admitted is admitted and the jury are placed in possession of it, there is an error in law in the trial under section 418 and there is a misdirection of law when the Judge tells the jury that it is evidence which they can consider and on which they can, if they think proper, convict the accused. The fact that after putting the jury in possession of the inadmissible evidence the Judge in his charge goes on also to point out circumstances which would justify the jury in disbelieving the wrongly admitted evidence does not make the misdirection less a misdirection, since the presumption is that the jury are well aware that it is for them to appreciate the evidence and that they are at liberty to take or not the Judge's view of it. And in this case that presumption is supported by the view the jury have taken of the case notwithstanding the tenor of the Judge's charge. It is no answer to that to say that this particular evidence which was wrongly

admitted could not have influenced the jury. Where evidence which the law says shall not be admitted is let in with other evidence legally admissible, and where the former is of a material character, it would be mere speculative refinement to hold that the jury must have, in convicting the accused, relied upon the latter and rejected the former: see on this point Queen v. Chunder Koomar Mozoomdar. (1) In the present case almost every item of evidence relied upon by the prosecution was dealt with by the learned Judge in his charge in favour of the accused. Under these circumstances, we cannot say that the evidence of accused 1's confession which ought not to have been placed before the jury could not have influenced them in returning a verdict of guilty. We must take it, then, that there was a misdirection on a material point of law; but since the Judge directed the jury that the evidence of accused 1's confession was admissible as against him only and not against the other accused, the misdirection does not apply to their case. It is true that in directing the jury not to consider the evidence in question against accused Nos. 2 to 8, the learned Judge assigned three reasons for his view, and that one of those reasons was that the confession of accused No. I was self-exculpatory, inasmuch as it did not implicate himself to the same extent as them. As a matter of fact, the confession said to have been made to the Názir does not implicate any one but accused No. 8. The words of the confession as given by the Názir in his deposition. Exhibit 58, are: "Hosmane Balappa," (that is accused No. 8), "has made this will. I tell the truth before you. Hosmane Balappa has done all this." It is possible that the Judge's statement to the jury may have conveyed to them the impression that all the accused were in fact implicated by the confession; but, having regard to the emphatic manner in which the Judge told the jury that the confession was inadmissible as against accused Nos. 2 to 8, we must hold that so far as those accused persons are concerned there was no misdirection. But as to them, the question is whether there has been misdirection in that the Judge put before the jury the evidence of accused 1's

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That brings us to the second objection urged in support of this appeal. In his charge the Judge divided the evidence for the prosecution into six different heads, and one of them was, as he put it, the evidence of accused 1's conduct in removing certain property. In dealing with this latter evidence, he pointed out that the prosecution was "perfectly entitled to prove the conduct of accused 1 if such conduct is inconsistent with the existence of a will." and then he went on to comment upon the circumstances relied upon by the prosecution and elicited in the evidence of the witnesses for the Crown. The summing up was, on the whole, in favour of accused No. I on this head also, and the learned Judge concluded this part of the charge by warning the jury against the danger of reasoning from conduct, as men often acted unreasonably. So far the charge was unexceptionable from the point of view of the accused; but, seeing that it was open to the jury to give effect or not to the warning and that after all it was they who had to consider the evidence in question and their decision on facts was final, it was, we think, a serious omission on the part of the Judge not to have expressly warned the jury that the evidence of accused No. 1's conduct was inadmissible as against the other accused. It is true that almost at the conclusion of his charge he dealt with the question of the conduct of accused Nos. 2 to 8 and that there, too, he summed up the case in their favour by pointing out "the extreme improbability of conduct imputed to the accused persons." But that part of the summing up stands apart from the portion where the evidence of accused I's conduct was dealt with and treated as if it was evidence which could be considered as against all the accused persons and not merely accused No. 1; and nothing was said in that part by way of warning to the jury that, in considering the evidence of the accused's conduct, they should not consider it as against the rest.

We now come to the third and last objection. The accused were charged with the offence of forging a will of Lakshman Keshav Damle, and in all cases of forgery the question whether the signature said to be forged is genuine or not is more or less material. In the present case the theory of the prosecution as

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to the signature on the will, Exhibit 8, purporting to be that of Lakshman Keshav Damle does not appear very clearly upon the evidence recorded, and Mr. Branson who, we are informed, appeared in the Sessions Court to defend accused Nos. 4 and 8, and who has also appeared before us in support of this appeal on behalf of those accused, has urged that in his address the Public Prosecutor in the Sessions Court was not able to advance any particular theory with reference to the question of the genuineness or otherwise of the signature. The only oral evidence on the point adduced for the prosecution is that of the pardoned approver Mangesh. His evidence is to the effect that accused No. 8 produced before him a draft and gave him "a paper signed by Lakshman Keshav Damle. It appeared to be his signature." Then he goes on to state:-"I told Mr. Gloster that the signature was genuine and I recognized it as such. Even now I say that to me it appears a genuine signature." The prosecution have put in a number of documents (Exhibits 20 to 23 and Exhibits 26 to 29) containing what are admitted for the Crown and the defence to be the genuine signatures of Lakshman Keshav Damle. It must no doubt be taken as a matter of course that the jury looked at the signature on Exhibit 2 and compared it with the signatures on the other documents; but that does not cure the defect in the summing up. It was a matter of prime importance that the prosecution was not able to adduce any evidence beyond that of the approver and he could not deny nay, he admitted that it was a genuine signature of Lakshman. The learned Judge ought to have specifically dealt with this question and drawn the attention of the jury to the approver's evidence on the point and the absence of any evidence to the contrary. The omission, we think, falls within the principle of the ruling of the learned Chief Justice in Emperor v. Malgowda (1) that a non-direction amounts to a misdirection if the point is one of prime importance, especially telling in favour of the accused.

We, therefore, hold that there have been misdirections in the case and the question is, whether the verdict can be pronounced to be erroneous owing to those misdirections? Counsel for the

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appellants pointed out circumstances in the case and called our attention to certain portions of the evidence to show that the verdict of the jury was, as he put it, "astounding" and "manifestly erroneous." The learned Advocate-General, on the other hand, did not argue the case before us on the merits so as to show that the verdict was in accordance with the weight of the evidence and probabilities and such as reasonable minds could arrive at. He confined himself to the question whether there were misdirections, and if there were, whether the verdict was erroneous owing to them. For the reasons to be presently given, we have come to the conclusion that the verdict is erroneous; and we think that we must also hold that the verdict is vitiated by the misdirections with which we have dealt. We think that the reception of accused I's confession and the treatment of the evidence of accused 1's conduct as if it was evidence against all the accused, and the omission to deal with the question of the genuineness of the signature, must have seriously affected the merits of the case and influenced materially the verdict of the jury. In the language of Melvill, J., in the case above cited, "as it is impossible to know the exact amount of weight which the jury attached to the particular evidence in question," so far as that evidence was wrongly admitted and treated in the Judge's charge, the verdict of the jury "is so far invalidated that the Appellate Court cannot any longer accept it as a conclusive 'decision on the facts." It is competent to us, under these circumstances, to consider whether, after excluding the evidence wrongly admitted, the rest of the evidence is sufficient to sustain the verdict and to determine the appeal: see Queen-Empress v. Ramchandra, Criminal Ruling No. 11 of 1895.

We are spared the necessity of dealing with the evidence in detail, as it has been clearly set forth in the Judge's charge and its infirmities have been lucidly pointed out there. The case, moreover, for the prosecution is simple, though the evidence adduced is voluminous. The question is, whether the will, Exhibit 8, is a forgery? We have at the outset the unchallenged fact, sworn to by the approver, Mangesh, that the signature on Exhibit 8 is genuine and "appears to be a genuine signature." A comparison of that signature with the signatures on Exhibits

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20 to 23 and 20 to 29, which are admittedly genuine, has satisfied us that it resembles the latter and that there is no marked difference between them to excite suspicion. The Nazir, who is administrator of the property of the minor grandson of Lakshman, states in his deposition, Exhibit 4, that when he was first instructed that the will was not genuine, he was told that it was not genuine because Lakshman had not been in a position to make a will and that the ink of the signature was different from the body of the writing. But, so far as we can see, no difference of ink is perceptible.

We start, then, with this circumstance in favour of the will that the signature is genuine. The case for the prosecution, however, is that a week after Lakshman's death, the pardoned approver, Mangesh, was called to the house of accused No. 8, who there produced to him a draft and asked him to copy it on some pieces of blank paper, one of which contained Lakshman's signature. This story stands on the evidence of the approver alone; and it is so full of improbabilities that it is difficult to believe it. Here is a man who, when examined by the Mamlatdar and the Sub-Registrar, swore to the genuineness of the will, but who afterwards stated before Mr. Gloster, the District Judge of Belgaum, that it was a forgery, under the impression, as he stated then, that a pardon had been given to him. His story is that when accused No. 8 asked him to copy the will he refused, but that accused No. 8 having threatened him, he wrote it in the presence of several persons. The suggestion of the defence is that the statement made by the approver before Mr. Gloster was made because he had been won over by Jankibai's side; that just then he was hard up for money which he had to pay for tagai and that just about that period he was able to pay the amount. This suggestion finds some support from the approver's answers in cross-examination. There is, moreover, evidence to contradict this witness so far as it could be contradicted. Mangesh says that when he copied the will at accused No. 8's instance in the house of the latter, his (Mangesh's) brother Datto was present. Datto has been called for the defence and denies that he was present at any such meeting. Five witnesses examined for the defence swear that the will was written in Lakshman's house and

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presence by Mangesh, that it was signed by Lakshman in their presence, and attested by accused Nos. 2 to 8. Their evidence shows nothing which would justify us in disbelieving them and believing the approver. In his charge to the jury the Judge rightly brushed aside the evidence of the approver as unreliable. We have, in addition, the fact that accused Nos. 2 to 8 swore before the Sub-Registrar that Lakshman had signed the will in their presence and that they had attested it at his instance. The evidence for the prosecution shows that these eight persons were Lakshman's friends and that they are persons who are invited along with others on important occasions such as adoptions or executing deeds (vide Exhibits 9 and 11). This is the positive evidence to prove the genuineness of the will and the probabilities so far support it. When we are dealing with the question of probabilities and testing the oral evidence by means of them, the theory of improbability must be such, as observed by the Privy Council in Chotey Narain Singh v. Ratan Koer, (1) that "in order to prevail against such evidence as has been adduced" in support of the will, it must be "clear and cogent. It must approach very nearly to, if it does not altogether constitute, an impossibility." On what does the theory of improbability advanced in this case by the prosecution rest? First, it is said Lakshman "was not in a position to make a will" on the day and at the time the will is said to have been made, and when we come to examine what that means it comes to this, not that Lakshman was unconscious or so enfeebled by his disease (plague) that he was physically incapable of making the will, but rather that to almost every one who saw him he spoke as if he did not think he was going to die. The inference suggested is that as he did not take a serious view of his illness he did not feel the necessity of making a will and therefore could not have made one. A man may not think he is going to die and yet there is nothing improbable in his making a will. Here it is common ground that on Friday (the date of the alleged will) he had a bubo and that his case was discovered to be one of plague. It may be that to those who came to inquire after his health he spoke as if he did not take a scrious view of his illness; but that does not militate against the theory that

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seeing he had plague he thought it proper that he should make a will and not let his affairs lie uncertain in the event of his death. Some witnesses for the prosecution state that when they called on him on Friday he did not say anything about a will to them. That part of the evidence is purely negative and it is best answered in the language of the Privy Council in the case already cited that we cannot assume that a person who has made a will must necessarily have introduced the subject of it into his conversation with every friend or acquaintance whom he happened to meet. Three of Tatya's servants have been examined and they say there was no will; but, as the Judge put it in his summing up, this is not a reliable class of witnesses. Parshya (Exhibit 32) says that he was in Lakshman's house on Friday, that Lakshman was in the Majghar and that he saw no paper written. But he admits that on Friday he looked after the bullocks and that at intervals sat at the house; that he saw many persons come to see Lakshman and that out of the accused, accused No. 2 and some others may have come. He does not know what they did with Tatya. Gangappa (Exhibit 33), who says he attended on Lakshman on Firday, can tell that Rambhat. Krishnabhat and Vishnu, two of whom are witnesses for the prosecution, came to see Lakshman on Friday, but he cannot remember who else came. The third servant Abdul's story is discrepant and the Sessions Judge has commented on his demeanour as suspicious. There can be no doubt on the evidence for the prosecution that Lakshman was physically capable of making a will on Friday. The learned Sessions Judge charged the jury to that effect. The evidence is that he was conscious, though he had high fever and a bubo, and that he was able to converse with all who came to see him. The buby was under his right arm, but that could not have prevented him from putting his signature because witness No. 3, Krishnaji (Exhibit 9), who saw him at 9 P.M. on Friday, states that Lakshman told him that the bubo did not give him much pain.

We come next to the nature of the provisions of the will, which, according to the dictum of their Lordships of the Privy Council in Bamasundari Debi v. Tara Sundari Debi (1) " is always

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a material element in such questions, from its bearing on the probabilities of the case." The will, Exhibit 8, gives half the property to accused No. 1 and the other half to Lakshman's grandson, Keshav alias Bindoo; it provides for the maintenance of Lakshman's wife and daughter-in-law; it directs that accused I should manage the minor's share during the latter's minority. These are the main provisions of the will and the case for the prosecution is that as accused No. 1 had been given away in adoption and had become separate it is highly improbable that Lakshman would have given half of his property to him to the detriment of his own grandson. Here it becomes necessary to consider the state of Lakshman's family for some time before and at the date of his death. The undisputed facts of the case are that accused No. 1 was Lakshman's brother, given in adoption to their uncle. Accused No. 1 lived separate from Lakshman with his adoptive mother and managed the estate he had inherited from his adoptive father. This went on for some years, when accused No. 1's wife having died, he came and lived with Lakshman. All the witnesses for the prosecution examined on the point state that accused No. 1 lived and messed with Lakshman and managed Lakshman's shop and trade. Lakshman had a son called Ganpati who led a loose life and died. At the date of the alleged will, then, Lakshman's family consisted of himself, his wife, his daughter-in-law Jankibai, and a minor grandson, and accused No. 1 had been living with him and managing his shop for five or six years. When Lakshman fell ill Jankibai and the minor were not in Khanapur where Lakshman lived, but were living in her parent's house at Miraj. So far the facts are undisputed, but the case for the prosecution is that, though accused No. 1 lived with Lakshman and managed his shop and had done so for some years, his dealings and estate were kept and treated as separate and that his estate was considerably less than Lakshman's. Some witnesses have given evidence in support of this case, but it is evidence of the vaguest description and their denial of the defence that when accused No. 1 came and lived with Lakshman his estate was mixed up with the latter's is refuted by the statement which Lakshman's daughter-in-law, the mother of the minor, made before the arbitrators to whom

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the dispute which has led to this prosecution was referred after Lakshman's death. In that statement, which is recorded as Exhibit 54 in the case, Jankibai said: "From that time the plaintiff," that is accused No. 1, "began staying with my fatherin-law and began staying with us, having brought with him his whole property and business. It is therefore a very large portion of his property must have got mixed up with our property." Having regard to the fact, apparent from the evidence of witnesses for the Crown, that Lakshman not only allowed accused I to come and live with him but left the management of his shop to him, Jankibai's statement appears very probable. It appears that there were separate khatas of Lakshman and accused 1 in the accounts; but it is notorious that among trading families it is usual to have separate khatas in the names of their different members. The question, however, is not whether Lakshman and accused 1 were joint or separate in estate. That is a question which does not arise in the present case. Assuming that, legally speaking, they were separate in estate, the question is whether their mutual relations were such as to make it improbable that Lakshman should have made a will giving one-half of the property to accused No. 1. Lakshman was a wealthy sowkar and had only a minor grandson as his heir. He was attacked with plague and there is nothing unnatural or improbable in that he should have thought of providing for contingencies in the event of his death by giving a half-share in the estate, including his trade, to his natural brother, who had been managing it, so that he (accused 1) being the only adult male relation whom he could trust, the trade could go on and everything managed properly in the minor's interests on Lakshman's death. provisions of the will under these undisputed facts seem both natural and reasonable and tell in favour of its genuineness.

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asked Chimabai, the widow of Lakshman, for repayment. Chimabai was at the time herself lying ill, being attacked with plague, and it does not appear probable that accused 1 Waman would have raised the question of repayment to her when she was fresh in the pangs of widowhood and herself lying ill. But there is the evidence of the Mamlatdar Rajacharya that the will was mentioned to him the very next day after Lakshman's death. It appears from the record that the Mamlatdar's evidence was sought to be impugned in the Sessions Court by the allegation that he had been siding with the accused, that he was a Brahmin and that he was indebted to one of the accused. The Mamlatdar has on his oath denied the indebtedness and there is no foundation, so far as we can judge upon the evidence, for the insinuation against him. It is a noticeable feature of this case that the Mámlatdár, the Chief Constable, and the Aval Kárkún have supported the case for the defence. The story of the prosecution is that Lakshman having died on Saturday, a relation of Jankibai, accompanied by a friend, came from Miraj to Khánápur and put labels on the property of Lakshman. The friend and witness Dhondbhat who have been examined say that they went to the Chief Constable and asked his help in putting seals on the property and that accused No. 8 who was then present said that Lakshman had made no will. The Chief Constable denies that these people ever came to him. They also say that they went to the Mamlatdar and that the latter complied with their request and sent a Kulkarni to put seals on the property. The Mamlatdar denied all this on oath. The Aval Karkun says that when he was called as a Panch on Tuesday (Lakshman having died on Saturday) to settle the dispute about the seals put on the property, Lakshman's will was mentioned. If the case for the prosecution is true, we have here a huge conspiracy to which eight respectable men, some of them of different castes from that of accused 1, and the Chief Constable, the Mamlatdar, and the Aval Karkun, were parties. But the moment we come to examine the grounds on which this conspiracy is alleged to rest, we find that it stands on very slender basis. The fact that seals and labels were put on by Jankibai's relations is not denied for the defence; it is also common ground that a

dispute arose after they had been put on and that a Panch was called. The case for the prosecution is that during all this time no will was mentioned and that accused I had allowed the seals to be put on, but that the dispute arose in consequence of Chimabai's protest. But if accused 1 was so trustful and ready to give way to the people who came from Miraj, if he had no dispute to raise, where was the urgent necessity of putting seals on at all? According to the evidence for the prosecution he set up no claim, he put forward no will. The fact that seals were put on shows that a dispute arose as soon as the people from Miraj came, and if there was a dispute the legitimate inference is that it could only have been on account of the will. This inference is supported by the fact that a Panch was called to settle the dispute which had arisen on account of the seals put upon the property. One of the witnesses for the prosecution (Vishnubhat, Exhibit 10), says:—"The quarrel between accused 1 and the Phidakes arose out of the question of putting on those labels. Chimabai objected to this on Sunday night. Nevertheless the Phadakes put them on that night and when she found it out in the morning she was displeased. Accused No. 1 also objected strongly on Monday. It was over this dispute that the Panch was called." When the Panch were called, it is said, it was agreed that an inventory of the property should be made, but no inventory was made and the reason given is that accused 1 put off the making of an inventory. Evidence bearing on this part of the case is of so unsatisfactory a character that we cannot rest the convictions of the accused on it. and further it is opposed to the undisputed facts of the case. When the will was presented for registration, the Sub-Registrar called upon Jankibai to produce her evidence to show that the will was not genuine, and though she had then the assistance of her relations who were pressing her claim forward, she did not appear before the Sub-Registrar and adduce any evidence. evidence that accused 1 removed ornaments and misappropriated property is, again, of a weak character, and even if it is believed it cannot affect materially the question whether the will is forged. As remarked by the Judge in his charge, it is not necessarily inconsistent with the factum of the will; the same remark

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applies to the evidence that he had concealed certain bonds. which evidence again is not free from suspicion. The only remaining point is that accused 1 agreed to a reference of the dispute to arbitration, but that again is no evidence that the will is not genuine. As pointed out by the Judge in his charge, accused 1 agreed to the reference on certain terms, one of which was that he should get Rs. 10,000 from the property. Such a conditional consent can by no means be construed into an admission that the will was forged. Besides, there was the chance of the will being attacked on the ground of its invalidity. Many motives lead parties to agree to the compromise of a dispute privately, and the chief among them is the buying of peace and the avoidance of litigation: and when they do so agree the natural presumption is not that each necessarily admits his claim to be false, but rather that each gives up and waives his extreme contention and consents to an amicable settlement by third parties as arbitrators.

The conclusion we have come to is that the prosecution has failed to prove the case against the accused, that the verdict is manifestly wrong; and indeed for the Crown no attempt was made to support the convictions on the evidence legally admitted. We must, therefore, set aside the verdict of the jury and acquit all the appellants and direct that they be discharged.

APPELLATE CRIMINAL.

Before Sir L. H. Jenkins, Kt., Chief Justice, and Mr. Justice Batty.

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1902. September 4.

Sessions Judge—Jury—Summing up—Defective direction—Contentions placed before the Jury—Judge should not omit pointedly to call attention of the Jury to matters of prime importance especially if they favour the accused.

A Sessions Judge in summing up is entitled to have regard to the elaboration and skill with which the rival contentions have been placed before the jury by the advocates on both sides, but he should not in doing so omit pointedly to call the attention of the jury to matters of prime importance especially if they favour the accused, merely because they have been discussed by the advocate.

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APPEAL from the conviction and sentence recorded by J. C. Gloster, Sessions Judge of Belgaum, in a sessions trial under sections 467 and 471 of the Indian Penal Code.

One Tukaram bin Ravji claiming to hold a certain land as the tenant of one Godu Naikin brought a possessory suit in the Court of the Mamlatdar of Chikodi complaining that an obstruction was caused to his possession by the accused Malgowda bin Basgowda, who in support of his contention that he was the owner of the land, produced a sale-deed, dated the 22nd July, 1877, executed in his favour by one Parappa bin Chanappa. The Mamlatdar found the sale-deed to be a forgery and gave sanction for the prosecution of the accused. He was, thereupon, tried in the Sessions Court at Belgaum on two charges, namely: (1) that he forged or used as genuine knowing to be forged a sale-deed in the Court of the Mamlatdar of Chikodi in July, 1901, and thereby committed an offence punishable under sections 467, 471 of the Indian Penal Code, and (2) that at the time and place aforesaid he corruptly used as true the aforesaid sale-deed knowing such evidence to be false or fabricated and thereby committed an offence punishable under sections 193, 196 of the Indian Penal Code.

The Judge in his charge to the jury made the following observations:—

The first and the main question to which you must direct your attention is whether it is established beyond reasonable doubt that the document in question (Exhibit A) is a "false document" (section 464, Indian Penal Code). The prosecution alleges that it is a "false document" either

(a) as not having been in fact executed by Parappa by whom it purports to have been executed,

(b) as having been written not in 1877, as it purports to have been, but at a later date,

it may be a false document in both these ways. There must also be a dishonest or fraudulent intention in order to bring it within the definition in section 464, Indian Penal Code.

As you have observed a large mass of evidence deals with questions which may be described as of a "civil" character, you must be careful to assign to this portion of the evidence its proper position and not lose sight of the main

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question stated above whether in the first instance it is proved to your satisfaction and beyond reasonable doubt that Exhibit A is a "false document."

You will remember too that if there is a reasonable doubt accused must get the benefit of it: and you will remember that the burden of proof is on the prosecution: you are not directly concerned with the question who is entitled to possession of the land or who has been paying its assessment—these are only subsidiary questions—, nor have you to decide whether the accused has proved that the document is genuine. It is for the prosecution to prove to your satisfaction that it is not genuine.

The evidence regarding the litigation of 1869, regarding the alleged sale by Ningappa to Godu, and the latter's lease to Tukaram and regarding the latter's possession of the land is only of incidental value, as showing a motive for the alleged forgery, or the existence of circumstances which render probable the prosecution story regarding the forgery. I do not say you should ignore this evidence, but you must be very careful to assign to it its proper place. And you will observe that it would be quite possible to accept as wholly true the prosecution theory regarding the litigation of 1869 and its results, the purchase by Ningappa at a Court-sale, Ningappa's sale to Godu and all these other incidental matters, and yet it would by no means necessarily follow that the document in question was a forgery. I ask your special attention to this last remark.

The evidence on both sides has been carefully summarized by pleaders on both sides and I will not go through it in detail but will endeavour to indicate generally the points to which your attention should be specially directed.

Keeping in view the above remarks turn to the evidence of the first witnesses. It is for you to decide whether you accept Godu's story regarding her purchase and subsequent lease to Tukaram. Discrepancies in their story have been pointed out and you must decide whether these discrepancies are vital. As opposed to their evidence, the defence call several witnesses who testify to the possession of accused and Parappa. Many of these witnesses merely state generally that accused, or Parappa, was "in possession." As the Public Prosecutor points out, there is not much scope for cross-examination on evidence of this character; you will look at the evidence on both sides and decide whether you consider it established that Tukaram has been in possession of the land as alleged by the prosecution: still remembering that this is only one of the subsidiary questions.

Then there is the evidence regarding the litigation of 1869. The Public Prosecutor has carefully and I think fairly, reviewed the documents on which he relies, and looking to that evidence as a whole, it does in my opinion go to support his contention that in that litigation Chanappa, the father of Parappa, the alleged executant of Exhibit A, was worsted, at all events for the time.

But on the other hand those papers also go to show that he was prosecuting a claim bona fide: for instance the document, Exhibit 15, goes to show that Chanappa claimed to hold the land as tenant of Morbhat, one of the parties to the litigation, and it would not be impossible to suppose that notwithstanding Chanappa's failure to establish his position in 1869, accused might still—eight

years later (in 1877)—have purchased Chanappa's interest for what it was worth, taking the risk of litigation.

Then the Public Prosecutor had laid stress on the fact that the accused as officiating Patel signed certain summonses, prohibitory orders, &c., in those proceedings which must have shown him that Chanappa's claim was disallowed. The argument being that with this knowledge he would not have been so foolish as to purchase the land from Chanappa's son in 1877. It is for you to decide how far this argument is entitled to weight. I would merely point that in those proceedings accused was merely acting in his official capacity as a village officer and you are hardly entitled to judge his conduct in the same way as if he had been a party interested in those proceedings. Further, the alleged sale took place eight or nine years later in the course of which period circumstances may have altered.

Leaving these incidental questions which, as already explained, bear only indirectly on the question before you, turn to the more direct evidence. document, Exhibit A, purports to have been written by Shamrav Govind, and that is the allegation of the defence. This witness (No. 7 for prosecution) denies having written it. If you accept his evidence it goes far to support the prosecution theory that the document is a forgery, for if it is a genuine document why should the parties allege that it was written by a person by whom it was not written. But before accepting his story you should consider his evidence very carefully. You have also seen the specimen of his handwriting (Exhibit 33) made in Court in your presence, and you have had an opportunity of comparing it with Exhibit A. He pronounces against the document because (he says) his handwriting in 1877 would not have been so similar to his present handwriting. Do you consider this convincing? Then remember his story as to accused approaching him before the proceedings in the Magistrate's Court. He says that accused gave him no hint of any foul play, yet without seeing the document he, the witness (Shamrav), at once stated that he had not written it. Is there not some reason to suppose that he is keeping something back?

The Public Prosecutor has told you that in his opinion Shamrav may not improbably have written the document. That view suggested itself to me also. But it is a question of fact of which you are the judges. If you think that view is correct you have then this position to face. Either he wrote the document—at all events so far as the date is concerned—or else he wrote it on some other occasion, and if so can you doubt that he knew of and was party to the false entry of the date? In this latter case he would be in the position of an accomplice and his evidence would have to be received with the greatest caution.

You have to consider the evidence of Satyappa (witness No. 3 for defence) who states that he attested the sale-deed. He testifies to its genuineness. He too has given a specimen of his signature (Exhibit 96) and you have compared it with Exhibit A.

Then there is the evidence of Parappa, the alleged executant. He now says that he did execute it, and he therefore gives no assistance to the prosecution.

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EMPEROR C. MALGOWDA. But his previous evidence before the Mamlatdar (Exhibit 37) was to contrary effect. This same Survey No. 95 was then in question (1901) and he denied having sold it to accused, who was a co-defendant in those proceedings. You have heard his attempted explanation—that he thought another field was in question. But the plaint (Exhibit 41) shows that the case was confined to this survey number only. Do you think it probable that Parappa can really have been unaware of what the dispute was about? Then you have heard him deny seriatim the statements which he is said to have made before the Mamlatdar in his deposition (Exhibit 37). Do you attach more weight to that record duly taken or to the witness's memory? The prosecution say that his previous evidence was true and his present story false. It is for you to decide if this is so.

But even if you accept this view you are not entitled to ignore his present testimony and treat his previous statement as evidence against accused. What you have to decide this case on is the evidence adduced here before you; and the numest use the prosecution can make of the previous statement is to say to you "The witness now admits execution of the sale-deed, but we show you his diametrically opposite statement of last year. So you must attach no weight to his present testimony."

The above remarks cover the greater portion of the evidence and I do not think it necessary to go in detail through all the documents, which have been carefully put before you by pleaders on both sides. Do not lose sight of the fact that it is for the prosecution to establish that the document, Exhibit A, is a "false document."

If you hold this not established then the charge under sections 467, 471 falls to the ground. If you consider it is proved that Exhibit A is a "false document" then see whether the evidence establishes that accused dishonestly or fraudulently made it for one or other of the purposes mentioned in section 463, the words "to support any claim or title" or those on which the prosecution relies in this case.

There is no direct evidence of his making the document, but if it is proved that he dishonestly or fraudulently used it as genuine knowing it to be forged, then section 471 makes him liable as though he had actually forged it. If you hold it proved to be forged, then it being admitted that he used it, can you doubt that he did so fraudulently and knowingly.

Remember that in case of a reasonable doubt accused must get the benefit.

Turning to the second charge under sections 193 and 196, Indian Penal Code, in respect of which you will give me your opinion as assessors, I read to you section 192, Indian Penal Code. The prosecution contends that even if though forgery be not proved still the document contained a false statement as to Parappa handing over possession of the land, &c.

It is for the prosecution to establish the ingredients of the offence. I need hardly point out to you that in many documents, mortgage-deeds and others, loose statements as to one party being in possession are sometimes made, but though they be incorrect or untrue it does not follow that the offence of fabricating false evidence has been committed. You must be satisfied that the

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statement is wilfully false and made with the intention specified in section 192 to which I again direct your attention. Are you satisfied of this in the present case? If so you will ask yourselves the further question whether it is proved that accused used this "fabricated" evidence as genuine, with corrupt motive and knowing it to be false.

You observe that there is a difference between a false statement in a document and a "false document" (as defined in section 464); hence the two charges.

Give the whole case your careful consideration.

The jury unanimously found the accused guilty of the offence charged under sections 467, 471, Indian Penal Code, and as assessors they were of opinion that he was not guilty under sections 193, 194, Indian Penal Code. The Judge thereupon put the following question to the Jury.

Q.—I may take it then that your verdict of guilty under sections 467, 471, is based on the finding either that the document was not executed by Parappa or that it was not executed in 1877 on the date on which it purports to have been executed or that both these conditions were fulfilled?

A. (of Foreman).-Yes.

The Judge accepted the unanimous verdict of the jury and convicted the accused of forgery of a valuable security under sections 467 and 471, Indian Penal Code, and sentenced him to undergo rigorous imprisonment for two years. Under section 240 of the Criminal Procedure Code further inquiry into the charge under sections 193, 194 was stayed.

The accused appealed urging that-

The verdict of the jury was perverse and erroneous on the face of it.

The jury having found that there was no evidence that the accused knew that Exhibit A was false, the Judge ought to have himself applied the law and acquitted the accused instead of asking the jury any further question.

The Judge having asked the jury on what finding their verdict was based, ought to have ascertained from the jury the specific finding that they had arrived at and ought not to have accepted the simple answer "yes" to his question to the jury.

In the absence of any evidence that the document was not executed on the date on which it purports to have been executed, or that the document was executed on any particular date, and having regard to the fact that the prosecution admitted that the

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document was probably written by the person by whom it purports to have been written, there was no evidence before the jury of the document being a false document.

The Judge was in error in not summing up to the jury the evidence on both sides.

The Judge was in error in not admitting in evidence certain documents produced by a witness for the prosecution though some of them were certified copies of Government records and some were more than thirty years old, and in not giving proper facilities to the accused to prove certain other documents

The Judge was in error in allowing prosecution to adduce evidence which was not adduced before the Committing Magistrate and at the same time not giving the accused any adjournment in order to be ready to meet such fresh evidence.

produced by the same witness.

Branson (with V. V. Ranade for H. S. Dikshit), for the appellant (accused).

Ráo Bahádur V. J. Kirtikar (Government Pleader), for the Crown.

PER CURIAM:—The accused in this case has been found guilty of having forged a valuable security and of using the same as genuine, knowing or having reason to believe that it was forged. There were other charges preferred against the accused on which the jurors sitting as assessors expressed an opinion favourable to the accused. But we are now concerned only with the charges under sections 467 and 471, Indian Penal Code. Mr. Branson has pointed out that there was inconsistency between the verdict of the jury as such and the opinion expressed by the same individuals as assessors. If we were to limit ourselves to an examination of the words used, and to read them in their strictest sense, there would be great force in Mr. Branson's argument. We think the explanation of this apparent inconsistency is to be found in the meaning which the assessors must have attributed to the question proposed to them in the light of the Sessions Judge's direction to them on the second charge. But it is unnecessary to elaborate on this point, because there are other and more substantial grounds on which we cannot allow the present verdict to stand.

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Mr. Branson has said, and we agree with him, that the charge of the Judge in many respects leaves nothing to be desired. On most points the charge is admirable, but at the same time there are one or two vital points on which the Judge did not appreciate the real importance of certain portions of the evidence, so that his direction in regard to them has been defective. We accept the view that a Judge in summing up is entitled to have regard to the elaboration and skill with which the rival contentions have been placed before the jury by the advocates on both sides, but he should not in doing so omit pointedly to call the attention of the jury to matters of prime importance, especially if they favour the accused, merely because they have been discussed by the advocate. For instance, the evidence of Ningappa, who practically gives the lie direct to the tale set up by the complainant, deserved especial comment, for it was a matter on which he must have been competent to speak; there could have been no mistake on his part, and he must therefore have intentionally spoken either falsely or truly. Judge ought therefore to have expressly contrasted the evidence of Ningappa on the one side, the evidence of the prosecution on the other. Another matter which demanded special comment was document A: the date of that stamp paper, the endorsement of the stamp vendor, the signature of the attesting witness who is dead, all ought to have been specially commented on. We are quite conscious that even if it were made clear that the stamp was of the year it purports to be, that would not necessarily show that the document was not subsequently fabricated, still the matter should have been brought to the notice of the jury. More important is the fact that the prosecution has failed (for what reasons we confess we cannot understand) to lead any evidence to show whether the stamp vendor whose name appears under the endorsement of that document carried on that business in 1877 or not, for that was relevant to the question of the genuineness of the document. Then again it is nowhere suggested in the evidence that the signature of the attesting witness Parappa (who is said to have been dead several years, not less than 10 years), was a fabrication. This we think to be a matter of great importance, because manifestly if that was a genuine signature, the document could not have been of recent fabrication. The attention of the jury should have been

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specifically invited to a consideration of this matter. Then there is a point in which, we think, the jury may have failed to understand the value attributable to the proceeding in which the Sessions Judge described Chanappa as having been worsted, because all that this worsting consisted of was that the application to have the attachment removed failed on the ground that it was not properly stamped. We do not think that can be said to be a worsting which ought to have a material bearing on the question whether a few years after, with knowledge of the fact, a man would be likely to purchase the property from the person so worsted. The last point, but in a sense the most important. is that we think the learned Judge's charge must have induced the jury to attribute to the question of possession and title a subsidiary importance. Now it is curious commentary on this that when we asked the learned Government Pleader (than whom no one is more competent to deal with cases of this kind). what really was the direct evidence on which he would suggest that the forgery was made out, he answered that he relied on the evidence which proved that Godu's title had been made out. This appears to us to have been an answer he could not have failed to give, but manifestly if that be so, the title and the possession accompanying it were not of subsidiary but of prime importance. These grounds, therefore, without discussing the others urged before us, justify us in saying that this case, with all its doubts, has not been satisfactorily dealt with. Mr. Branson has further pointed out that certain evidence was improperly excluded. We should have been glad if we were in a position to deal with this point. But we do not know with precision what the excluded documents were and what they contained. All we know is that it is alleged that these documents contained valuable materials for the purpose of determining with whom title and possession to the property in question was in 1877 and prior to that date. If that be so, these documents did deserve a place in the records of this trial; and when the case comes for rehearing we have no doubt the learned Judge will consider how far the documents are of the description attributed to them before us. We refrain from expressing any opinion about them.

With these remarks we set aside the verdict and sentence and send back the case for a fresh trial.

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ADEN COURT—Suit in Civil Court of Resident at Aden—Transfer to the High Court—Power of High Court—Jurisdiction—Aden Courts Act (Bom. Act II of 1864)—Letters Patent, 1865, clause 13.

See Letters Patent 575

ADMINISTRATOR—Sale of immoveable property by administrator of deceased person-Title-Succession Act (X of 1855), sees. 179 and 269-Administrator of trustee-Title of assignce of administrator as against cestui que trust-Priority. One Anna De Silva, a Christian inhabitant of Bombay, died intestate in May, 1893, leaving her surviving a minor son (the plaintiff), her husband (defendant 1) and a daughter who died in infancy. Previously to her death the deceased purported to purchase certain leasehold property situate in Bombay, the sale-deed of which was duly executed in her name. In August, 1893, her husband (defendant 1), being called upon to make good a large sum of money for which he was responsible as cashier of Messrs. Graham & Co. of Bombay, handed over the title-deeds of the said property to two representatives of the firm, viz., J. F. N. Graham and another, stating that his deceased wife Anna De Silva was mercly a trustee of it, and that the beneficial interest was vested solely in him. On the 18th September, 1893, he executed a conveyance of the property to the said two representatives of Graham & Co. He was shortly afterwards convicted of criminal breach of trust at the prosecution of Graham & Co. On the 1st November, 1893, J. F. N. Graham obtained a limited grant of letters of administration to the estate of Anna De Silva, under section 221 of the Indian Succession Act (X of 1865). Subsequently Graham & Co. sold the property to the second defendant, the said J. F. N. Graham joining in the conveyance as administrator of Anna De Silva's estate. In 1902 the plaintiff, as son and heir of Anna De Silva, brought this suit, claiming to recover his share of the said property, alleging that it belonged absolutely to his mother. The second defendant (the purchaser from Graham & Co.) denied that it had belonged to Anna De Silva. He alleged that it really belonged to her husband (defendant 1), who had paid for it and for whom she was a trustee. He further contended that, in any event, he had a good title as against the plaintiff having purchased from the administrator of Anna De Silva's estate.

Held, that, assuming that the property did belong to Anna De Silva, the second defendant had acquired an indefeasible title to it by virtue of the conveyance to him to which her administrator was a party. Her interest in it had vested in her

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administrator under section 179 of the Succession Act and under section 260 he could dispose of it as he might think fit.

Held, also, that even if Anna De Silva held the property as trustee, the second defendant was entitled. The legal estate passed to her administrator, and he conveyed it to the second defendant, who also obtained the equitable estate when he received the title-deeds from Graham & Co. as assignees of the first defendant, who was one of the heirs of Anna De Silva and who asserted his own title to the whole property to the exclusion of the plaintiff. The second defendant's title was therefore complete, unless he could have detected the falsehood of the first defendant's claim by reasonable diligence, and there was nothing to show that he could.

DE SILVA v. DE SILVA

(1902) 27 Bom. 103

ADOPTION—Vatan—Adoption of a person not a member of the Vatandár family—Gordon Settlement—Vatan Act (Bom. Act III of 1874).] A saual with respect to vatan property which was subject to the Gordon Settlement contained the following clauses:

2nd.—No nazrána or other demand on the part of Government will be imposed on account of the succession of heirs, lineal, collateral or adopted, within the limits of the Vatandár family, and permission to make such adoptions need not hereafter be obtained from Government.

3rd.—When all the sharers of the vatan agree to request it, then the general privilege of adopting at any time any person (without restriction as to family) who can be legally adopted, will be granted by Government to the vatan on the payment from that time forward in perpetuity of an annual nazrána of one annua in each rupce of the above total emoluments of the vatan.

It was contended that the adoption of a person who did not belong to the Vatandar family in respect to whose vatan the said sanad was granted, was invalid.

Held, that the sanad did not prohibit such an adoption and that the adoption in question was valid.

BALAJI RAMCHANDRA DESUPANDE v. DATTO RAMCHANDRA. (1902) 27 Bom. 75

See MINOR

mil.

Hindu Law—Chudasama Gameti Garasias—Castom prohibiting adoption—Effect on adoption of the natural son having survived his father and attained ceremonial competence.] A custom alleged to exist in the Hindu easte of Chudasama Gameti Garasias prohibiting adoption was held to be not proved.

A member of that easte died in 1887 leaving a widow and a sou, who died in 1889 between fifteen and sixteen years of age and unmarried. In 1891 the widow adopted a son to her husband.

Held, that the adoption was valid.

It was contended that the adoption was invalid on the ground that the natural son had survived his father and lived to attain ceremonial competence. Both the Courts below found that he was a minor and numerical when he died.

Held, that as there appeared to be no fixed age at which a Hindu boy was supposed to have attained ceremonial competence, and as there was no proof in this case that the son had, or was treated as having, attained such competence, the objection was not sustained.

Vевавнаї v. Ваї Нівава

(1903) 27 Bom. 492

ADOPTION—Limitation Act (XV of 1877), sch. II, art. 118—Declaration that the adoption is invalid—Knowledge—Death of adopter—Date from which limitation runs.

See Limitation Act ...

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ADVERSE POSSESSION—Mortgage—Redemption—Adverse possession as against mortgagor - Possession obtained under an agreement with mortgagee - Notice to mortgagor of such possession-Limitation Act (XV of 1877), sch. II, art. 144.] The plaintiffs filed this suit to redeem a mortgage with possession of certain land dated 18th October, 1866. The plaintiffs were the daughters and grandson of the mortgagor, Khntubsha (the widow of one Kondi Aga). The first defendant was the grandson and heir of the mortgagee (Nageshrae). The second and third defendants were nephews of Kondi Aga. They denied that the plaintiffs, being females had any right to the property, and they alleged that they themselves had been in possession since 1885 under an agreement with Nageshrao, the original mortgagee, and they contended that the plaintiff's claim was therefore now barred by limitation. It appeared that in 1885 defendants 2 and 3 had claimed to be the heirs of Kondi Aga, the husband of the mortgagor, and had entered upon the land. The mortgagee thereupon filed a suit against them under section 39 of the Dekkham Agriculturistis' Relief Act (XVII of 1879), which, however, was settled by an agreement before the conciliator on the 31st August, 1885, whereby defendants 2 and 3 undertook to pay off the mortgage and it was agreed that they should remain in possession of the land. This agreement was filed as a decree on the 27th November, 1885, under section 44 of the Act. The last instalment of the mortgage-debt was paid to the first defendant by defendants 2 and 3 in September, 1897. The plaintiffs had no notice or knowledge of any of the abovementioned proceedings. On the 5th October, 1897, the plaintiffs filed this suit to redeem the mortgage of 1866 and to recover possession of the lands. The lower Courts held that the plaintiffs were the heirs, but that the suit was barred by limitation under article 144 of schedule II of the Limitation Act (XV of 1877). inasmuch as defendants 2 and 3 had been in adverse possession for more than twelve years. On appeal to the High Court,

Held, (reversing the decree of the lower Court and remanding the case) that the suit was not barred. The possession of the defendants was not adverse to the plaintiffs inasmuch as there was no notice or knowledge, or circumstance that could have given notice or knowledge to the plaintiffs (mortgagors), that the defendants' possession was in displacement of their rights. They had no reason to know that their rights were invaded and until they had such reason there could be no necessity for them to take action.

TARUBAI v. VENKATRAO

(1902) 27 Bom.

of a math for valueable consideration—Suit by his successor to recover possession—Trustee, alienation by—Limitation—Limitation Act (XV of 1877), sch. II, art. 134.

See ALIENATION

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Limitation Act (XV of 1877), sch. II., arts. 134 and 144—Temple property—Manager—Trustee—Lease by manager—Suit by subsequent manager to recover the property.] In 1845, one Krishna Swami granted a mulgeni (perpetual) lease of the land in question to the defendants' grandfather, Hannanna. The lower Appellate Court held that at the date of the grant Krishna Swami was manager of the temple Shri Ramchandra Devasthan, and that the land at that time belonged to the temple. In 1854 Krishna Swami's successor, the then manager of the temple, sued Hannanna (the lessee) for enhanced rent, but the latter pleaded his lease and the suit was withdrawn. In 1885 the then manager brought a similar suit against the defendants with a similar result. In April, 1900, the present plaintiff, as manager of the temple, filed this suit to eject the

defendants, alleging that they were yearly tenants and that he had given them notice to quit. He contended that his predecessor, Krishna Swami, had no power to alienate the property of the temple.

Held, that the suit was barred by limitation. If the original lessor was not a trustee for the temple of the land in question, then the defendants had held by adverse possession, and the suit was barred under article 144 of the Limitation Act (XV of 1877). If the original lessor was a trustee, he had, as such, alienated the land for valuable consideration and the suit was barred by article 134 of the Limitation Act. The fact that there was a lease to the defendants, and not an absolute alienation, made no difference. A mulgeni lease is a purchase pro tanto of the interest thereby assured.

NABAYAN v. SHRI RAMCHANDRA (1903) 27 Bom. 373

ADVERSE POSSESSION—Limitation Act XV of 1877, sch. II, arts. 120, 189 and 144—Permanent tenancy—Void lease—Estoppel—Ratification—Acquiescence—Evidence Act I of 1872, secs. 115, 116—Registration Act (III of 1877), sec. 49—Unregistered lease—Admissibility in evidence—Panch Mahals—Landlord and tenant—Disclaimer of landlord's title.

See Landlord and Tenant 515

ALIENATION—Limitation Act (XV of 1877), sch. II, art. 134—Alienation of trust property by gurn of a math for valuable consideration—Suit by his successor to recover possession—Trustee, alienation by a—Adverse possession—Limitation.] The gurn or manager of a certain math, who, as trustee, held certain property belonging to the math, sold it for value to the defendant in 1871. In 1898 his successor sued to recover it, contending that the vendor had no power to alienate the trust property.

Held, that the suit was barred by limitation under article 134 of the Limitation Act (XV of 1877).

DATTAGIRI v. DATTATRAYA (1903) 27 Bom. 363

See MINOR 390

APPEAL—Death of joint appellant pending appeal—Legal representatives of deceased appellant not brought on the record—Appeal proceeded with by surviving appellant—Power of Court to hear the appeal and reverse whole decree—Practice—Procedure—Civil Procedure Code (Act XIV of 1882), secs. 362, 544 and 582.

See CIVIL PROCEDURE CODE: PRACTICE 284

Privy Council—Application for leave to appeal—Companies Memorandum of Association Act (XII of 1895), secs. 9 and 10—Appeal against order passed under the Act—Test of pecuniary sufficiency or substantial question of law—Civil Procedure Code (Act XIV of 1882), secs. 594, 595 and 647—Decree—Definition of Decree—Case otherwise fit for appeal—Practice—Procedure.

See Privy Council 415

Application to be declared an insolvent—Subject-matter of the suit over Rs. 5,000 in value—First Class Subordinate Judge—Rejection of the application

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CHARGE TO JURY—Sessions Judge—Misdirection—Inadmissible evidence—Criminal Procedure Code (V of 1898), sees. 418, 423 (2)] Where a charge to the jury by the Sessions Judge is, upon the whole, favourable to the accused, and most of the points of importance in favour of accused are more or less dealt with in the charge, the mere fact that some of the points are not so amplified as they might have been does not amount to a misdirection.

Before the High Court can interfere with the verdict of a jury on the ground that the evidence of accused's confession was wrongly admitted, it must be satisfied, firstly, that the verdict is erroneous; secondly, that the erroneousness was caused either by the Judge's misdirection to the jury as to that evidence or by a misunderstanding on their part of the law as to it as laid down by the Judge.

Where material evidence which ought not to be admitted is admitted and the jury are placed in possession of it, there is an error in law in the trial under section 418 of the Criminal Procedure Code (Act V of 1898), and there is a misdirection of law when the Judge tells the jury that it is evidence which they can consider and on which they can, if they think proper, convict the accused. The fact that after putting the jury in possession of the inadmissible evidence the Judge in his charge goes on also to point out circumstances which would justify the jury in dishelieving the wrongly admitted evidence does not make the misdirection less a misdirection.

Where evidence which the law says shall not be admitted is let in with other evidence legally admissible, and where the former is of a material character, it would be more speculative refinement to hold that the jury must have, in convicting the accused, relied upon the latter and rejected the former.

EMPEROR v. WAMAN ... (1903) 27 Bom. 626

Jury—Summing up—Defective direction—Contentions placed lefters the jury—Judge should not omit pointedly to call attention of the jury to matters of prime importance especially if they favour the accused, Criminal Pro-

GENERAL INDEX.

cedure Code, sec. 297.] A Sessions Judge in summing up is entitled to to the elaboration and skill with which the rival contentions have before the jury by the advocates on both sides, but he should not in doi pointedly to call the attention of the jury to matters of prime importancif they favour the accused, merely because they have been discussed.	oeen placed ng so omit e especially
advocate.	002) 27 Bom. 64
CHARGES, JOINDER OF—Number of charges—Same transaction. See Critical Procedure Code	135

CHUDASAMA GAMETI GARASIAS-Custom of adoption among.

See ADOPTION

CIVIL PROCEDURE CODE (ACT XIV OF 1882), sec. 13—Suit for arrears of maintenance—Former suit for arrears for a different period—Surety—Continuing guarantee—Pleadings by surety denying liability in a suit dr not operate as notice of revocation of suretyship—Contract Act (IX of 1872), sec. 130—Resjudicata.] By a settlement executed in 1898 the first defendant agreed (interalia) to pay maintenance to the plaintiff (his wife) at the rate of Rs. 91 per annum. The second defendant signed the deed as surety. In 1898 the plaintiff sued both defendants to enforce her rights under the settlement and (inter alia) for arrears of maintenance for ten months and sixteen days from the 10th November, 1897. The defendants pleaded that the deed was void for want of consideration. The first Court found that the settlement was not void and passed a decree against both the defendants, but as to the payment of arrears of maintenance the decree was against the first defendant only. The second defendant appealed against the decree so far as it was against him, contending that the settlement was not in any way binding on him. The plaintiff filed cross-objections to the decree, contending that the second defendant ought to have been held liable for the arrears of maintenance. At the hearing of the appeal, however, the plaintiff withdrew her cross-objections, and the decree of the first Court was confirmed

In 1901 the plaintiff filed this suit against both defendants to recover arrears of maintenance for two years and nine months, commencing from the 27th September. 1898. The second defendant pleaded that, inasmuch as he had not been held liable for maintenance in the former suit, the plaintiff's claim was res judicata.

The lower Courts passed a decree for the plaintiff, holding that her claim was not res judicata. On appeal to the High Court,

Held, confirming the decree of the lower Courts, that the plaintiff's claim against the second defendant in this suit was not res judicata. The only point that was res judicata against her by the former suit was her right to the arrears therein claimed, but that did not bar her right to sue the second defendant as surety in respect of the subsequent arrears claimed in the present suit.

It was contended for the second defendant that the pleadings in the former suit operated as notice under section 180 of the Contract Act (IX of 1872) and put an end to his contract of guarantee.

Held, that the denial by the second defendant of his liability in the pleadings in that suit was made for the purposes of pleading and could not have any other effect than was given to it in the suit itself. It could not operate as notice under section 130 of the Contract Act.

BUIKABHAI V. BAI BHURI (1903) 27 Bom. 418 -sec. 27-Partnership-Parties -Joint family-Partners-Coparceners not necessarily partners-Suit in the name of the owner of a firm-Adding parties. See Partnership ...

OIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 43—Cause of action—Splitting of cause of action—Suit to recover exclusive possession of land—Suit to obtain a share by a partition of land—Certificate of sale relied upon in both suits.] The plaintiff, in execution of a decree obtained by him, purchased at a Court-sale the right, title and interest of his judgment-debtors Rajaram and Sitaram in certain lands; and on the 12th November, 1886, he obtained a sale certificate in respect of all the properties so purchased. In 1891 he brought a suit (No. 519 of 1891) against the heirs of Sitaram, then deceased, for possession of certain of the lands included in the sale certificate, of which they were in exclusive possession, and he obtained a decree. In the next year, 1892, he brought another suit (No. 518 of 1892) against the heirs of Rajaram, then deceased, and another person, for possession of other lands included in the sale certificate, of which they were in exclusive possession, and he again obtained a decree. In both the above suits he based his claim on the sale certificate showing his title as purchaser. The remainder of the lands included in the sale certificate were held by the heirs of Rajaram and Sitaram jointly with other members of the family who were coparceners with them, and in 1897 the plaintiff filed this suit to recover by partition the shares of the heirs of Rajaram and of Sitaram in these lands, basing his claim upon the sale certificate. The lower Courts rejected the claim on the preliminary ground that the suit was barred by the provisions of section 43 of the Civil Procedure Code (Act XIV of 1882).

Held, by Chandavarkar and Aston, JJ. (Crowe, J., dissenting), reversing the decree and remanding the case, that the suit was not barred by section 43. That section does not apply where the cause of action is different. The title on which the former suits were based was exclusive ownership, while that on which the present suit was based was joint ownership. A person who has succeeded in recovering one property under one title is not debarred from suing to recover another property under another title.

The certificate of sale is not the title; it is merely the title deed.

NABAYAN v. SHAMRAO (1903) 27 Bom. 379

Secs. 48 and 54—Limitation—Suit is instituted when plaint presented—Plaint presented insufficiently stamped—Deficency subsequently paid—Limitation Act (XV of 1877), sec. 4—Account—Barred item—Interest not allowed on barred item of account.] Where a plaint was presented on the 14th September, 1900, with an insufficient stamp, but the deficient stamp duty was paid on the 18th September, 1900,

Held, that for the purpose of limitation the suit was instituted on the day on which the plaint was presented, viz., the 14th September, 1900, and not on the day on which the deficient stamp duty was paid, viz., the 18th September, 1900.

In an account, interest cannot be allowed on items that are barred by limitation. Interest is but an accessory, and when the principal is barred the accessory falls along with it.

DHONDIRAM v. TABA SAVADAN

... (1902) 27 Bom. 330

Notice to show cause why decree should not be executed—Date of the order—Step in aid of execution—Limitation Act (XV of 1877), sch. II, art. 179 (5).

See Lamitation Act 6

by a mortgage without sanction of Court—Mortgage-bond void.] The plaintiff was the holder of a decree against the defendant for Rs. 2.370. On the 28th November, 1895, the plaintiff advanced to the defendant Rs. 59, and in consideration of this advance and of the amount already due by the defendant to the plaintiff under the decree, the defendant mortgaged certain property to the plaintiff. The

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mortgage-bond provided for payment of interest on the mortgage-debt at the rate of 103 per cent. per annum. The plaintiff subsequently sued on the mortgage to recover the principal and interest.

Held (dismissing the plaintiff's sait), that the mortgage was void under section 257 of the Civil Procedure Code (Act XIV of 1882), no sanction having been obtained.

Heera Nema v. Pestonji Dossabhoy (1898), 22 Bom., 698, followed.

DHANRAM v. GANPAT (1902) 27 Bom. 96

CIVIL PROCEDURE CODE (ACT XIV OF 1882), sec. 273—Decree for dissolution of partnership—Money-decree—Execution of mony-decree—Attachment of decree for dissolution of partnership.] Certain creditors of a partnership obtained a money-decree against the firm. In execution of their decree they sought to attach and sell a decree for the dissolution of the firm and for the taking of the accounts of the partners and for the incidental reliefs requisite in such decrees, including the appointment of a receiver and a direction to pay the debts of the firm.

Held, that the decree for dissolution could so far be regarded as a money-decree and could therefore be attached but not sold. The proper remedy in such cases is by proceedings under section 273 of the Civil Procedure Code.

SIDLINGAPPA v. SHANKARAPPA

... (1963) 27 Bom. 556

SECS. 316, 317—Execution sale— Certificate of sale not conclusive as to the property sold at execution sale.

See Execution Sale

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SEC. 331—Specific Relief Act
(I of 1877), sec. 9—Suit for possession—Execution of decree—Obstruction—
Application for removal of obstruction registered as a suit—Questions arising
in such suit.] In the case of a claim numbered and registered under section 331
of the Civil Procedure Code (Act XIV of 1882) in a suit between a decree-holder
and an obstructing claimant, the only issues arising are whether the person obstructing was in possession of the property in question on his own account or on account
of some person other than the judgment-debtor (i. e., the defendant in the original
suit). No question requiring the decree to be re-opened can be raised.

MAHOMED ISUB v. BASHOTAPPA

... (1903) 27 Bom. 202

SECS. 344, 345, 588 (17) AND 589—Application to be declared an insolvent—Subject-matter of the suit over Rs. 5,000 in value—First Class Subordinate Judge—Rejection of the application—Appeal—District Coart.] In a suit, the subject-matter of which was over Rs. 5,000 in value, the plantiff applied for execution. The defendant applied to be declared an insolvent under sections 344 and 345 of the Civil Procedure Code (Act XIV of 1882). The First Class Subordinate Judge rejected the application. An appeal was preferred to the High Court.

Held, dismissing the appeal and returning the memo of appeal for presentation to the proper Court, that the appeal lay to the District Court under section 588, clause (17), and 589 of the Civil Procedure Code (Act XIV of 1882).

Venkatrayeo v. Jamboo Ayyar (1892) 17 Mad. 377, not followed.

Манекsна v. Dadabhai (1903) 27 Bom. (04

Page.

died, and her representatives were not brought on the record. The surviving appellant, however, preceded with the appeal and, at the hearing, the decree of the lower Court was reversed and the plaintiffs suit dismissed. The plaintiffs filed a second appeal to the High Court and contended that the lower Appellate Court ought not to have heard the appeal inasmuch as it had abated, or at all events that that Court had no power to reverse the lower Court's decree so far as it related to the deceased appellant.

Held, that, as the two defendants had appealed on grounds common to them both, the lower Appellate Court had power to hear the appeal and to deal with the whole suit under section 544 of the Civil Procedure Code (Act XIV of 1882).

CHINTAMAN v. GANGABAI (1903, 27 Bom. 284

CIVIL PROCEDURE CODE (ACT XIV OF 1882), secs. 365, 367, 588, cl. (48), and 591—Limitation Act (XV of 1877), sch. II, art. 175 A—Suit to recover possession—Death of the plaintiff pending suit—Legal representative—Procedure.] On the 30th November, 1897, Mahadev Naravan sued to recover certain property from the defendants. He died on the 27th February, 1899, and his nice Balabai (his sister's daughter) applied to be put on the record as his heir and legal representative. It did not appear that the defendants had notice or knowledge of her application, and on the 5th June, 1899, her name was placed on the record under section 265 of the Civil Procedure Code (Act XIV of 1882). In July, 1899, Balabai applied to be allowed to prosecute the suit as a pauper. The defendants opposed this, but took no objection to her right to appear as Mahadev's representative. In August, 1899, the first defendant filed his written statement, in which for the first time he raised the question as to Falabai's right to represent the deceased plaintiff Mahadev. The case subsequently came on for hearing and issues were raised on the pleadings, the first issue being whether Balabai was Mahadev's legal representative. Evidence was taken on all the issues, and the Court found all of them in Balabai's favour, and passed a decree accordingly. The defendant appealed, and the Appellate Court, being of opinion that other issues were unnecessary until the issue as to Balabai's right to represent Mahadev was decided, raised only one issue upon that point. It found that Balabai was not the nearest heir and legal representative of the deceased plaintiff Mahadev, and thereupon it reversed the lower Court's decree and dismissed the suit. On second appeal,

Held, by Chandavarkar and Batty. JJ. (Aston, J., dissenting), reversing the decree and remanding the case for a decision on the merits, that the lower Appellate Court was wrong in going into the question as to Balabai's right to represent the deceased plaintiff Mahadev and in dismissing the suit on finding that she had no such right.

Per Chandavarkar J.:—The Subordinate Judge acted rightly under section 365 of the Civil Procedure Code (Act XIV of 1882) in placing Balabai on the record. It was doubtful whether he could afterwards re-open the question and consider it at the hearing under section 367. But assuming that he could, he decided it with the other issues. His decision on that point was an order appealable under clause 18 of section 588. But the defendant did not appeal against that order. He appealed against the whole decree and in his appeal he objected to the order. Under section 531, however, he could, in such case, only object to the order if it affected the decision of the case. It was not shown that the order made by the Subordinate Judge under section 367 had affected the decision of the case. There is no provision in the Code that, if a person claiming as legal representative of a deceased plaintiff fails to prove that he holds that position, the suit must be dismissed. Inasmuch as the defendant had failed to show that the order under section 367 had affected the decision, the lower Appellate Court ought not to have reserved the decree of the Court of first instance.

... (1902) 27 Bom. 162

$\mathbf{P}_{\mathbf{a}}$
CIVIL PROCEDURE CODE (ACT XIV OF 1882) SEC. 380—Cosis, security for— Two plaintiffs, father and daughter—Suit for damages for breach of promise to marry.
See Costs
——————————————————————————————————————
See Jurisdiction
for injunction against Secretary of State-Irrisdiction.
See Jurisdiction
Temporary injunction to restrain suit brought by defendant in the Small Causes Court—Specific Relief Act (I of 1877), sees. 53, 54 and 56.] In a suit by plaintiffs in the High Court to recover damages for breach of contract, they sought to obtain an interlocutory injunction restraining the defendant from proceeding with a suit filed by the defendant against the plaintiffs in the Small Causes Court in respect of the same contract until the hearing of the High Court suit.
Held, that an application to restrain a suit in the Small Causes Court does not come within the provisions of sections 492 and 493 of the Civil Procedure Code.
The provisions of the Civil Procedure Code as to temporary or interlocutory injunctions are not the same as those under the Judicature Act, 1873, section 25, sub-clause 8. As the injunction asked for is a perpetual one, it can, under the Specific Relief Act, only be granted by the decree made at the hearing.
JAIRAMDAS v. ZAMONLAL (1903) 27 Bom. 357
otherwise fit for appeal—Practice—Procedure—Pr
See Privy Council 415
COCAINE—Abkari Act (Bombay Act V of 1878), sees. 3 (9), 62—Medicated article—Intoxicating drug.] The term "medicated article" as used in section 62 of the Bombay A'bkari Act (Bombay Act V of 1878), applies to something which is manufactured and by that manufacture is imbued with certain medicinal properties. It does not therefore include cocaine, which is a medicine per se.
The word "intoxicating" as used in section 3, clause 9 of the Bombay A'bkari Act (Bombay Act V of 1878), cannot be confined to its derivative manning, namely poisonous: the word must be taken to be used in its popular sense, which would include the effects produced by cocaine.
EMPEROR v. Jamsetji C. Cana (1903) 27 Bom. 551
OMPANY—Articles of Association—General meeting of shareholders—Proxies—Qualification of proxy—Memorandum of Association—Alteration of Memorandum of Association—Companies Memorandum of Association Act (Act XII of 1:95).] The right of a shareholder to vote by proxy depends on the contract between himself and his co-shareholders, and where parties have a right depending on the contract between them and other parties, then all the requisitions of the contract as to the exercise of that right must be followed.

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Article 65 of the Articles of Association of the Bombay Burmah Trading Corporation, Limited, provided as follows: "No person shall be appointed or have authority to act as a proxy who is not a shareholder in the Company."

Held, that the above article imposed two essential conditions, viz., that the proxy should be a shareholder at the date of his appointment and also at the date when he acted.

Held, that, not having been a shareholder at the date of his appointment as required by article 65, he had not been validly appointed a proxy.

It is not necessary that the actual name of the person appointed to be proxy should appear in the proxy paper. It suffices if he is designated by a description which fixes his identity at the date of appointment.

In the matter of the Bombay Burman Trading Corporation,

LIMITED (1902) 27 Bom. 113

COMPANY—Memorandum of Association Act (XII of 1895), sees. 9 and 10—
Appeal against order passed under the Act—Application for leave to appeal—
Test of peruniary sufficiency or substantial question—Case otherwise fit for appeal—Civil Procedure Code (XIV) of 1882, sees. 594, 595 and 647—Privy

Council - Practice - Procedure.

See Privy Council 415

CONTRACT—Railway Company—Carriage of goods—Formation of contract—Rules of Company for consignment of goods—Re-booking of goods after arrival at original destination—Instructions to station master to re-book.] The rules of a Railway Company prescribed certain procedure for the booking of goods. In accordance with those rules certain goods were booked from Trichinopoly to Bigalkot. The plaintiff requested A, the goods clerk and station master at Hotgi (on defendants' Railway), to have the goods re-booked from Bagalkot to Hotgi, and for this purpose handed him the railway receipt with a written application, which, however, was not in the form of consignment used by the Company. A accordingly sent a service telegram to the station master at Bagalkot asking him to re-book the goods. The station master there did not re-book the goods and they were delivered at Bagalkot. The plaintiff sued the Railway Company for damages for non-delivery at Hotgi.

Held, that the defendant Company had not contracted with the plaintiff to carry the goods from Bagalkot to Hotgi. The mere fact that the plaintiff got A, the station master at Hotgi, to send a service telegram to Bagalkot did not constitute a contract to bind the Company.

MALKARJUN SHIDAPA 9. SOUTHERN MARATHA RATEWAY
COMPANY ... (1902) 27 Bom. 126

CONTRACT—Executory contract—Breach—Binding character—Suit for damages— Bombay District Municip 1 Act Amendment Act (Bombay Act II of 1884), sec. 30—Municipality.

See MUNICIPALITY

... 618

CONTRACT ACT (IX OF 1872), SEC. 74—Bond—Instalments—Failure to pay instalments—Interest at a higher rate from the date of the transaction—Penalty.]

Defendants borrowed a sum of Rs. 200 from the plaintiffs and gave a bond dated the 12th December, 1879, for Rs. 250, repayable by monthly instalments of Rs. 5. The bond provided that, in case of default in payment of any instalment, interest at 24 per cent, per annum should be charged from the date of the bend. The sum of Rs. 203-2-9 was paid by defendants up to the 9th July, 1884, after which date no payments were inade. The plaintiffs claimed interest from the defendants at the rate of 24 per cent, calculated from the date of the bond.

Held, that the provision in the bond that, on default, interest at 24 per cent, per annum should be charged from the date of the bond was in the nature of a penalty; and that the amount claimed could not be recovered.

TRIMBAR v. BHAGCHAND

(1902) 27 Bom. 21

-sec. 130—Res judicata—Civil Procedure Code (Act XIV of 1882), sec. 13-Suit for arrears of maintenance-Former suit for arrears for a different period-Surety-Continuing guarantee-Pleadings by surety denying liability in a suit do not operate as notice of revocation of suretyship.] By a settlement executed in 1896 the first defendant agreed (inter alie) to pay maintenance to the plaintiff (his wife) at the rate of Rs. 91 per annum. second defendant signed the deed as surety. In 1898 the plaintiff sued both defendants to enforce her rights under the settlement and (inter alia) for arrears of maintenance for ten months and sixteen days from the 10th November 1897. The defendants pleaded that the deed was void for want of consideration. The first Court found that the settlement was not void, and passed a decree against both the defendants, but as to the payment of arrears of maintenance the decree was against the first defendant only. The second defendant appealed against the decree so far as it was against him, contending that the settlement was not in any way binding on him. The plaintiff filed cross-objections to the decree, contending that the second defendant ought to have been held liable for the arrears of maintenance. At the hearing of the appeal, however, the plaintiff withdrew her crossobjections, and the decree of the first Court was confirmed with costs.

In 1901 the plaintiff filed this suit against both defendants to recover arrears of maintenance for two years and nine months, commencing from the 27th September, 1898. The second defendant pleaded that, inasmuch as he had not been held hable for maintenance in the former suit, the plaintiff's claim was resindicate.

The lower Courts passed a decree for the plaintiff, holding that her chief was not res judicata. On appeal to the High Court,

Held, confirming the decree of the lower Courts, that the plaintiff's claim against the second defendant in this suit was not res judicata. The only point that was res judicata against her by the former suit was her right to the arrears therein claimed, but that did not bar her right to sue the second defendant as surely in respect of the subsequent arrears claimed in the present suit.

It was contended for the second defendant that the pleadings in the former suit operated as notice under section 130 of the Contract Act (1X of 1872) and put an end to his contract of guarantee.

Held, that the denial by the second defendant of his liability in the pleadings in that suit was made for the purposes of pleading and could not have any other effect than was given to it in the suit itself. It could not operate as notice under section 130 of the Contract Act.

BHIKABHAI V. BAI BRURI

(1903) 27 Bom. 418

CONVEYANCE—S	stamp—Indian	Stamp Act	(II of 1899)), seb. I ante	23 21_	Pago
Havala—Letter him (the debtor)	' ou a acotor ai	theorizana me	yment to his	ereditor of me	oney due to	
See Stamp	. ***	•••	•••			150
costs—Practice—see 380—Two promise to mar. Rs. 10,000 as de daughter (plaint the benefit of the that he (the fath costs if he lost tiperty in India. Frocedure Code, ordered that seem	munitys, father mys.] A Parsi umages for the iff 2). The dele father, who so ter) was an unhe suit, and the The defendant requiring the crity for costs s	father and daught father and defendant? fendant alleg ught to make discharged in at the second took out as plaintiffs to hould be giv	der—Suif for daughter (plai s breach of hi sed that the se entoney out of a solvent and r d plaintiff (the ammons under	damages for ntiffs 1 and 2) s promise to uit was really his daughter's not in a positi e daughter) he e section 380 o 7 for costs.	breach of sued for marry the a suit for betrothal: on to pay and no profithe Court	
BOMANJI v.	NUSSERWANJI			(1902) 27 Bom.	100
Privy Co prosecution—Or respondent's cost See Privy	s of appacemen	ue Illan Coi	urt thus the ar	d dismissed f pellant shoul	ld pay the	
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COURT—Jurisdiction of Governor of whether ultra vi. Acquisition Atpolicy, High Own not a Court.	res—Subordina (I of 1894)—Ix	Vouncel, zur te Legislatu idian Counc	re—Creation of 1 re—Creation ils Acts, 1861	High Court to of New Cour and 1892—Or	ts—Land	
See Jurisdi	CTION	***	466	•		424
Letters of admir of joint property Hindu died inte deceased's estate with the Bank of Bank and the Cowere obtained. It these portions of duty thereon un Subsequently au that the property the deceased and therefore, under schargeable.	passing by su passing by su state leaving t consisted of t Bombay and t mpany refused Letters of admi the estate of t der article XI, application was in respect of w his sons and	on—Letters evicorship—. wo sons who wo sums of the other wit to pay these nistration we he deceased schedule I or made for a thich it had and passed to	of administra, dipplication for owere joint is. 5,000, one is a Commerci sums unless lare accordingly and a sum of fithe Court Forefund of this been paid was to the latter by	or refund of a with him. Profund of a with him. Profund of which was al Company, etters of admi obtained in. Rs. 207-2-0 w. ees Act (VII amount on the sthe joint profusion of a very survivorship.	in respect duty.] A art of the deposited Both the inistration respect of as paid as of 1870), e ground roperty of and that	

Held, that the refund could not be allowed. The section only applies where probate or letters of administration have already been granted on which the Courtfee has been paid. In such case no further duty is payable in respect of property, held by the deceased as trustee. But where no duty has been paid the section does not apply. Here no letters of administration had been granted other than those in respect of which the refund was applied for. Therefore, there were no letters on which the Court-fee had been paid so as to bring the case within the section and to entitle the present letters of administration to exemption.

H.17, also, that in the present case no letters of administration were necessary. The family property vested in the sons at once by survivorship (section 4 of Act V of 1881.) But when the letters of administration were applied for, the applicant must be taken to have adopted the case of the Bank of Bombay, that so far as the

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sons were concerned the deposit was made by the deceased, and that it was his estate. Having invoked the jurisdiction of the Court by means of that statement the applicant could not be allowed to say that the statement was incorrect and that no letters of administration were necessary.

COLLECTOR OF AHMEDABAD v. SAVCHAND

... (1902) 27 Bem. 140

COURT SALE.—Auction purchaser—Lis pendens—Applicability of the rule of lis pendens to a purchaser at an execution sale.

See LIS PENDENS

. 206

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 195—3 mall Cause Court—Registrar of Small Cause Court—Sanction to prosecute granted by Registrar—Revocation of sanction—Chief Judge can revoke it as a public officer—Jurisdiction of Small Cause Court to revoke the sanction—Presidency Small Cause Courts Let (XV of 1882), sec. 35.] The Registrar of the Court of Small Causes has authority, under section 195, clause (1) (a), of the Criminal Procedure Code (Act V of 1808), to grant a sanction for the presecution of an offence under section 182 of the Indian Penal Code (Act XLV of 1860) as the public officer concerned.

It is competent to the Chief Judge of the Court of Small Causes, to whom the Registrar is by law subordinate, acting as a public servant, to revoke the sanction granted by the Registrar. But it cannot be revoked by the Small Cause Court composed of one or more Judges.

In the matter of GOVERDHANDAS MEGHJI ...

(1902) 27 Bom: 130

sec. 200 – Discharge of accused person under—Order of discharge set aside by High Court and order made that accused be arrested and committed for trial at the Sessions of the High Court—Practice—Fracedure—Sufficient ground for committing for trial, what is Jurisdiction—Revisional jurisdiction of High Court—Oriminal Procedure Code (Act V of 1898), secs. 423, 439—Presidency Magistrate.

See JURISDICTION

SA

Number of charges—Same transaction.] The fact that offences are committed at different times does not necessarily show that they may not be so connected as to fall within section 235 of the Criminal Procedure Code (Act V of 1878). The occasions may be different, but there may be a continuity and a community of purpose. The real and substantial test by which to determine whether several offences are so connected as to form the same transaction depends on whether they are so related to one another in point of purpose, or as cause and offect, or as principal and subsidiary acts, as to constitute one continuous action.

The accused was tried at one trial for three offences: (1) for having in his possession on the 9th October, 1902, certain stencil plates for the purpose of counterfaiting Hubbock & Co.'s trade-mark on two kegs of paint (section 485 of the Indian Pend Code), (2) for having, on or about the 7th October, 1902, sold 12 kegs of paint to which a counterfeit trade-mark was affixed (under section 486 of the Indian Pend Code), and (3) for having in his possession for sale on or about the 4th October, 1902, certain kegs of paint, purporting to be Hubbock's paint, having a counterfoit trade-mark (under section 486). He was convicted and separately sentenced for such offences. He appealed, contending that the trial was illeged, integrated had been charged at one trial with offences which were not connected together so as to form the same transaction, under section 235 (1) of the Criminal Procedure Code (Act V of 1898).

Held, dismissing the appeal, that the trial was not illegal. There was a community and also a continuity of purpose in the possession and the sale—the possession of the instruments was the cause, the possession of the kegs and their sale the

	effect, and both the	possession	and the sal	è had one i	ntention a	nd simed of	rage
	result, namely, that article of Hubbock	or deceiving	; buyers int	o parchasing	g what was	not the gen	uine
	EMPEROR v. SE	ERUFALLI A	LLIBHOY	***	*40	(1903) 27 1	Bom. 135
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	See CHARGE TO	JURY	•••	•••	•••	***	644
	to jury - Sessions Ja	udge—Misd	irection—In	nadmissible	evidence.	123 (2)—Ch	arge
	See CHARGE TO	Juny		•••	•••	***	626
	Magistrate—Dische Code (4ct V of 189 made that accused be Court—Practice—Fis—Jurisatetion—Raud 423 of the Crimaside an order of dische necessary, and to aurested and forthwite	c arrested a Procedure— Procedure— Pevisional joinal Procedurate passed charge passed direct that	of discharged committees of the committees of the contraction of the c	edersection e set aside ed for triale round for e of High Co he High Co idency Mac	209 of Cri by High (at the Sess committing nert.] Un net has ju istrate, it's	Court and o ions of the 1 for trial, der sections risdiction to	dure rder High what 439 set
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	The words in sectifor committing "me which the evidence arises when credible conviction. It is not the guilt of the commit when the evidence are against the upon himself to disc a conviction.	an, not sufficient witnesses m of necessary accused be dence for the e necused, r	to put the ake stateme that the Marie making prosecution of the correction of the co	I for convict accused on a swhich, i agistrate sh g a commit on is sufficients a wro	ing, but r his trial a f believed ould satisf ment. It ent to ma	efer to a cas and such a would sus y himself f is his duty ke out a pr ion if he to	e in case tain ully 7 to ima
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DECREE—Civil Procedure decree by a mortgage wi	Code (2 thout say	Act XIV wition of	of 13 Court	82), sec Mortg	c. 257 A age-bon	l—Satisfa d void.	ction of	•
See CIVIL PROCEDU	RE COD	E	***		•••	•••	•••	- 96
Privy Council— dum of Association Act (under the Act—Test of Civil Procedure Code (X —Case otherwise fit for	XII of 1 f pecuni IV of 18	895), secs ary suffic 382), secs	• 9 and iency o • 594, 59	10—Az r subst 5 and	ppeal ag	ainst orde	r passed	
See Privy Council			***		•••	•••		415
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DOCUMENT—Evidence Ac Proper custody—Presum Registration Act (III of	iption-1	Registrati	ion-Co	Docum nstruct	ents th	irty year. cc —Posse	s old— ssion—	
See EVIDENCE ACT							-	452
EQUITY OF REDEMPTIO to the payment of the bion-Once a mortgage a	onds bet	ore reden	2022022-	Choan	ma tho o	austa of a	sion as cdemp-	
See Mortgage			0.00			*** 10	•••	154
ESTOPPEL—Landlord and sion—Disclaimer of land of forfeiture—Limitation Evidence Act (I of 1872)	llord's ti Act (2	tle to evid XV of 18	ct—Ack. 77), sci	nowLed	mement i	of went	Vainon	
See Landlord and	CENANT .	•••				100		515
EVIDENCE—Hindu law—C Omission to mention nike as disentitling her to ma- or issues.] The omission mention of the nika wife, marriage having taken pla- stances of the marriage ma- hushand's testamentary b depend on her legal right t stances of the marriage ma- latter course.	intenance, in a vis, so fice; but i de it nat ounty ar o mainte de it not	will made will made ar as it go to cogene; arral that ad improper annual that an improper annual that are annual that an improper annual that are are annual to the area annual that are are annual that are are annual that are are are are annual that are	te after a not speater a ster a goes, an y must a the wife bable that the	marria coificat a alleg item lepend s shou at he ise it w	ge—Une ly raise ed nika of evid on when ld be a should as Acld or would	chastity of in ple in ple in ple in ple in ple in acting a charthal con object have left that the chart th	widow adings of all not the iream- of the her to iream- en the	
A draft of the will, w furnishing similar evidence rejected as evidence, not be	ing writ	ton states	ment by	tho te	vas neu stator	t to be r	ightly	
A charge of unchastity a raised in the pleadings or is	adis nell	l	1			st by speci nor issue	Scally as to	

such unchastity, it was held that the defendants could not found any such allegation on their general denial in the pleadings that the plaintiffs (the widow and her daughter) were entitled to maintenance, and on an issue "whether the plaintiffs are entitled in any event to maintenance or marriage expenses."

HAJI SABOO SIDICK v. AYESHABAI

... (1903) 27 Bom. 485

EVIDENCE ACT (I OF 1872), sec. 90 — Documents thirty years old—Proper custody—Presumption—Registration—Constructive notice—Possession—Registration Act (III of 1877), secs. 17 and 50.] A registered document contained a recital of unregistered incumbrances, and a question having arisen as to whether the recital of the unregistered incumbrances amounted to notice,

. Held, that registration is at most constructive notice and the doctrine of constructive notice cannot be so extended as to cover unregistered documents under which the holders of registered documents derive title.

The defendants further relied on their being in actual possession.

Possession amounts to notice of such title as the person in possession may have, and any other person who takes a mortgage or other charge upon, or purchases, immoveable property without ascertaining the nature of the claim of the person in possession, does so at his own risk.

The general consensus of opinion of all the High Courts in India is that possession is at least a very cogent evidence of notice which a purchaser cannot with safety disregard, and that section 50 of the Registration Act (III of 1877) does not do away with the effect of notice in favour of the registration to which cateris parillus it gives preference.

Per Bully, J.—Section 90 of the Evidence Act (I of 1872) admits a presumption of the genuineness of the documents purporting to be thirty years old, if produced from proper custody proved to have had a legitimate origin "or" an origin the legitimacy of which the circumstances of the case render probable. It is not necessary that the documents shall be found in the best and most proper place of deposit. The section insists only on a satisfactory account of the origin of the custody and not on the history of its continuance.

Per Aston, J. - Section 90 of the Evidence Act requires that a document must be produced from the proper custody.

SHARFUDIN v. GOVIND ...

... (1903) 27 Bom. 452

escence—Unregistered lease—Admissibility in evidence—Registration Act (III of 1877), sec. 49—Lindland and tenant.

Se LANDLORD AND TENANT

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EXECUTION—Decree for dissolution of partnership—Decree for money—Execution for money-decree—Attachment of decree for dissolution of partnership—Clvil Procedure Code (XIV of 1882), sec. 273.

See Civil Procedure Code

. 556

Notice to show cause why a decree should not be executed—Date of the order—Step in aid of execution—Limitation Act (XV of 1877), seh. II, art. 170 (5)—Decree—Civil Procedure Code (XIV of 1882), see. 248.

Se Limitation Act.

. 622

EXECUTION SALE—Certificate of sale not conclusive as to the property sold at everation sale—Civil Procedure Code (Act XIV of 1882), sees. 316, 317.] A decree on a mortgage directed that the whole interest of five brothers in the mortgaged larges should be sold. The proclamation of sale stated also that the whole

interest in the house was to be sold. The sale took place and the plaintiff was the purchaser. By a mistake, however, on the part of the officer in charge of the sale, the memorandum of sale, the certificate of sale, and the receipt of possession passed by the plaintiff omitted to mention the names of four of the brothers and erroneously stated that the interest only of one of them had been sold. The defendant subsequently obtained a money decree against some of the other brothers and, in execution, sold their interest in the house, purchased it himself and took possession of a part of the house. The plaintiff, thereupon, brought this suit to eject him. The lower Appellare Court dismissed the suit, holding that in ejectment the plaintiff was bound to give strict proof of his title and that the certificate of sale was conclusive evidence of the property which had been purchased by him. On appeal,

Held, reversing the decree of the lower Court, that the plaintiff was entitled to a decree. The certificate of sale was not conclusive as to the property which had been purchased by the plaintiff. The property offered for sale and bid for by the plaintiff was the property ordered to be sold and proclaimed for sale. What was sold to the plaintiff was the interest mentioned in the Court's order and proclamation, and the sale of that property became absolute by the order which confirmed the sale.

Balvant v. Hirachand ... (1903) 27 Bom. 334

EXECUTOR—Will—Probate—Probate granted to some of the executors—Executors who have not proved may call for inventory and account from executors who have proved and are managing the estate.] One Ardeshir R. Divecha, a Parsi inhabitant of Bombay, died in 1900. By his will be appointed his wife, his eldest son and two other persons, of whom the applicant was one, to be his executors, his wife and eldest son being named as managing executors. In 1901 the two latter applied for probate. The other two executors, though called on to join in the application, did not do so. The Court granted probate to the wife and the son, and reserved leave to the other executors to apply. No application was, however, made by them. In 1902 the applicant called upon the managing executors for an inventory and account of the deceased's estate. The applicant had no beneficial interest in the estate. It was contended for the managing executors that the applicant had no right to require an inventory and account from them.

Held, that the applicant was entitled to an inventory and account. The facts that under section 179 of the Indian Succession Act (X of 1865) the property of the deceased vested in the applicant as executor of the will, and that he might at any time apply for probate, gave him an interest sufficient to justify his application.

JEHANGIR R. DIVECHA 2. BAI KUKIBAI ... (1903) 27 Bom. 281

FRAUDULENT CONVEYANCE—Suit by one creditor to set aside deed—Creditor not a judgment-creditor—Transfer of Property Act (IV of 1882), sec. 53—Meaning of the word "Creditor"—Statute 13 Eliz., c. 5.] Under section 53 of the Transfer of Property Act (IV of 1882), a creditor may sue to set aside a deed executed by his debtor by which he (the creditor) is defrauded, defeated or delayed, although he has not obtained a decree for the debt in respect of which he is a creditor. But such a creditor can only sue on behalf of himself and all other creditors.

ISHVAR TIMAPPA HEGDE v. DEVAR VENKAPPA SHANBOG ... (1902) 27 Both. 146

Transfer to one creditor—Good faith.] One Byramji Kuverji died in June, 1882, indebted to several creditors. Immediately after his death his sons mortraged but property to Moti Gelaji, one of his creditors. On the 11th August, 1897, another creditor, Jaitha Kupaji, obtained letters of administration to the estate of the deceased, and as such administrator sold the property to the son of the meetings the latter having died. Subsequently the plaintiffs obtained a money decree against the estate and sued to establish their right to attach the property, alleging that the sale was void under section 53 of the Transfer of Property Act (IV of 1882). The lower Appellate Court held that the purchase was for value and that there was no evidence of fraud, and it dismissed the suit. On second appeal.

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Held from the land						Pag
Held (affirming the decree) of the whole of the property ence. The only question was of good faith in such cases is benefit to the grantor. On this case it was intended that	s whether to whether the the finding	he transaction he transaction he transfer	of his credi on was in go is a mere el	iors made ood faith, oak for re	no differ The test taining a	40
NATHA v. MAGANCHAND	15 17 18		· · · ·		27 Bom.	32
GIFT—Donor not in possession— share—Strunger to the gift of tion—Misjoinder of parties Practice—Procedure—Hinds	-Plaintit	S 2211 5 2 Cl 3 F 2 I	_ d reasons on or	ift of an u	ndivided	1
See HINDU LAW	***	***	•••			31
GOVERNMENT RESOLUTION liability of, to be sued.	N-Defamo	ttion contai	ned in-S	eeretary o	f State,	
See JURISDICTION	•••	•••	***	***	7.44	189
HIGH COURT RULE 577-						
Per Russell, J—Under rule 5 section 45 of the Specifi and not by petition.	77 of the lic Relief A	High Court et (I of 18	Rules all 77) should	application be made by	s under notion	
Gell v. Taja Noora		341.0		(1903) 5	27 Bom.	307
HINDU LAW - Adoption - Chud tion - Effect on adoption of artained ceremonial competent Chudasana Gameti Garasias pr	the natur. ce.] A cus	at son havi	ing survive	prohibitin d his fatt	g adop- ter and	
A member of that easte died 1880 between fifteen and sixtee adopted a son to her husband.	l in 1887.	leaving our	idear and a	non sub-	3:-1:-	
Held, that the adoption was	valid.					1.0
It was contended that the a son had survived his father and Courts below found that he was	u liveu to s	LEGICAL COLORS	omial commi	oturios . Il	natural oth the	
Held, that as there appears supposed to have attained cerem was that the son had, or was objection was not sustained.	ed to be no	fixed ago a	t which a	Hindu be	in this	
VERABHAI v. BAI HIRABA				(1003) 27	Bom. 4	92

Cutchi Memons—Marriage, evidence of, where disputed—Omission to mention niles wife in will made after marriage—Unchastity of widow as discretiting her to mointenance—Charge not specifically raised in pleadings or issues.] The omission, in a will made after an alleged niles marriage, of all mention of the niles wife, is, so far as it goes, an item of evidence against the marriage having taken place; but its cogency must depend on whether the circumstances of the marriage made it natural that the wife should be an object of the husband's testamentary bounty and improbable that he should have left her to depend on her legal right to maintenance. In this case it was held that the circumstances of the marriage made it not unlikely that the testator would have taken the latter course.

A draft of the will, written by a person other than the testator, tendered as furnishing similar evidence to that afforded by the will, was held to be rightly rejected as evidence, not being a written statement by the testator.

A charge of unchastity as disentitling a widow to maintenance must be specifically raised in the pleadings or issues. Where there was no averment of, nor issue as to such unchastity, it was held that the defendants could not found any such allegation on their general denial in the pleadings that the plaintiffs (the whow and her daughter) were entitled to maintenance, and on an issue "whether the plaintiffs are entitled in any event to maintenance or marriage expenses.'

... (19(3) 27 Bom. 485 HAJI SABOO SIDICK v. AYESHABAI

HINDU LAW-Gift-Donor not in possession-Donee not placed in possession-Gift of an undivided share—Stranger to the gift disputing its validity—Adverse possession—Limitation—Misjoinder of parties—Plaintiff's discretion as to addition of parties—Practice—Procedure.] The plaintiff's father and uncles were members of a joint Hindu family, but in 1870 they separated and partitioned the family property with the exception of certain land, which was kept joint and was applied to the maintenance of their mother during her lifetime. It remained in the possession of the plaintiff's father, who was the eldest of the family. The mother died in 1877, but the land still remained joint and continued in the possession of the plaintiff's father. On 15th November, 1877, the plaintiff's uncles M and J by a registered deed gave to their nephew, the plaintiff, their undivided shares in this land. They were not, as already stated, in possession and they did not deliver possession of their shares to the plaintiff or to any one on his behalf. The plaintiff's father (their co-sharer) was in possession and he continued in possession after the gift was made. The plaintiff was at that time, and until 1892, a minor and lived with his father as a member of a joint family. On the 1st January, 1887, his father mortgaged the whole of the land to the second defendant, who at once entered into possession. Subsequently the land subject to this mortgage was sold in execution of a decree against the plaintiff's father and was purchased by one Kirpashankar Ranchhor. In 1892 the plaintiff attained his majority and on the 2nd January, 1899, he filed this suit against his father (defendant 1) and his father's mortgagee (defendant 2) to recover the land which had been given to him on the 15th November, 1877. Kirpashankar was not made a party to this suit. The lower Court rejected the plaintiff's claim on the ground that the gift to the plaintiff by M and J of their undivided shares of land not in their possession, and of which the plaintiff was not put into possession, was invalid. They also held that Kirpashankar should have been a party and that the plaintiff's claim was barred by limitation, inasmich as the mortgages had held adverse possession since 1st January, 1887, i.e., more than twelve years. On appeal to the High Court.

Held, (reversing the decree of the lower Court) that-

(1) The gift to the plaintiff in 1877 was valid. The donors, in relinquishing their claim to their undivided shares, had done all that was practically necessary, and by the registered deed of gift had done all that they could do, and the possession of the father was practically the only mode in which the plain iff, who was then an infant, could accept or exercise possession. The donors pover objected and made no attempt to revoke their gift. No division was necessary, as the whole of the land was in the possession of the plaintiff's father.

(2) The fact that the shares were undivided did not render the gift invalid. This was not a gift by members of an undivided family to an outsider as in Vrandavandas v. Yamunabai ((1875) 12 B. H. C. R. 220. It was a gift by persons who were not members of an undivided family (the plaintiff's nucles) having previously separated from his father) to the plaintiff, a merabar of mother coparcenary. No consent was necessary to validate the alienation, nor was there any one who did or could object.

(3) The plaintiff's claim was not barred by limitation. The property did not pass to the mortgagee until 1st January, 1887, and this suit, instituted on 3rd January, 1899, allowance being made for the vacation, was therefore in time.

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(4) The auction-purchase bound to sue every possible question that might arise settlement, he did it at his JOITARAM v. RAMKRIS.	between own risk.	him and t	be protion	purchaser to	was not we the future	1
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HINDU LAW—Partnership— ners not necessary partners ment—Civil Procedure Cod See Partnership				Partners—Cof the firm—2	mend-	ı K#
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to refer a dispute to arbit manager of a joint Hindu ; to bind the family by a ref family property to arbitrat family. Minors in the fam the award made upon it.	family, ever erence of a ion, provid-	dra—Alin when he dispute w	ors bound is not the f ith any out	by the awar ather, has the sider regardin	l] A power ig any	
BALAJI W. NANA			***	(1903) 27	Rom	ಎಲ್-
Succession 1	Outernal as	mt Date		(1000) 2)	DUM	201
son.] Under the Hindu Law of the puternal grandfather to the paternal aunt.						
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INÁM VILLAGE—Partition— ment of Inum property—Cle succession—Custom.	Inám villag sim that I	e granted l nóm villa	y Peishwa- Je was imp	-Right of mar partible—Righ		
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INDIAN COUNCILS ACTS, (Bambag Act IV of 1898)—I jurisdiction of High Court to ture—Greation of New Court policy, High Court's power Trust Act not a Court—X What defices vitiate on Act,	consider was s—Land A	wers of clether ultre equisition	vires—Su Act (Lof. 18	sombay in Con bordinate Leg 894) — Questio	Act ncil, isla- ns of	
See Jurisdiction		•••	•••	•••	4	21
INHERITANCE—Succession —I son—Hinda Law.	aternal on	itPateri	al great-gr	andjather's gr	and.	
Seg Hindo Law b 1515—4	• • • -	•••			6	10
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INJUNCTION—Temporary injunction to restrain suit brought by defendant in the Small Causes Court—Civil Procedure Code (Act XIV of 1882), sees. 492, 493—Specific Relief Act (I of 1877), sees. 53, 54 and 56.] In a suit by plaintiffs in the High Court to recover damages for breach of contract, they sought to obtain an interlocutory injunction restraining the defendant from proceeding with a suit filed by the defendant against the plaintiffs in the Small Causes Court in respect of the same contract until the hearing of the High Court suit.

Held, that an application to restrain a suit in the Small Causes Court does not come within the provisions of sections 492 and 493 of the Civil Procedure Code.

The provisions of the Civil Procedure Code as to temporary or interlocutory injunctions are not the same as those under the Judicature Act, 1873, section 25, sub-clause 8. As the injunction asked for is a perpetual one, it can, under the Specific Relief Act, only be granted by the decree made at the hearing.

JAIRAMDAS v. ZAMONLAL (1903) 27 Bom. 357

Specific Relief Act (I of 1877), sec. 56—Discretion—Municipality—Bombay District Municipal Act (Bombay Act III of 1901), secs. \$2 (c), \$6—House-tax—Suit for injunction restraining levy of tax—Right to sue in Civil Court without first proceeding under sec. \$6.] The Surat City Municipality served, under section \$2, clause (3), of the Bombay District Municipal Act (III of 1901), a notice of demand upon the plaintiff for house-tax due by him. The plaintiff, instead of proceeding under section \$6 of the Act, instituted a suit in the Civil Court for an injunction to restrain the Municipality from recovering the house-tax from him. The lower Courts rejected the claim on the ground that, as the plaintiff had omitted to appeal to a Magistrate under section \$6 of the Act, his suit was premature.

Held, that section 86 was permissive merely, and that it did not make it neumbent in every case upon a party complaining of an illegal levy of a tax by a Municipality to appeal against the action of the Municipality to a Magistrate before suing in a Civil Court. But

Held, also (confirming the decree), that the injunction prayed for in this case could not be granted. By section 56 of the Specific Relief Act an injunction cannot be granted where efficacious relief can be obtained by any other usual mode of proceeding. Section 86 of Bombay Act III of 1901 gave a remedy to the plaintiff, but instead of resorting to it he filed this suit for an injunction. It was discretionary for a Court to grant an injunction and that discretion must be exercised judicially with extreme caution and only in very clear cases. This was not a case of that kind.

CHUNILAL v. SURAT CITY MUNICIPALITY

... (1963) 27 Bom. 403

See Jurisdiction

INSOLVENT ACT (STAT. 11 and 12 Vict., c. 21), secs. 47 and 50—Offence under sec. 50 a criminal offence—Charge, &c., must be framed to sustain conviction and sentence—Opposing creditors—Grounds of opposition should be stated in clear terms—Practice—Procedure.] Insolvents were found guilty under section 50 of the Indian Insolvent Act of wilfully preventing or purposely withholding the production of certain papers relating to their affairs and sentenced to three months' imprisonment.

Held, that the proceedings, so far as they resulted in imprisonment, amounted to a criminal case.

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Held, further (for all criminal cases it conviction, as a four the order for imprise	is necess idation f	ary that or the se	there shountenees ": n	ld hoa ch	arero o find	inmand .	1
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See LIMITATION			***	***	•••		
Bond— the date of the transa	-Failure	to pay is	istalments-	Interest a	t a higher r	ate from	
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See Conteact A	C P	653	•••	•••			21
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be allowed on items th and when the principa	at are par	rea by r	imibation.	Interpet re	but on an	cannot ressory,	
Defonderam v. I	ABA SAV.	ADAN		•••	(1902) 27	Bom. 3	30
INIONICATING DRUG Cocame.] The word of A'bkiri Act (Bombay , namely poisonous: the would include the office	Act V of I word mus	ang as 1878) can st be take	used in secti not be confi on to be use	on 3, clause	9 9, of the I	ombay	
Emperor v. Jan			••	•••	(1903) 27	Bom. 57	1
POINDER OF CHARGES	-Numbe	er of cha	rues—Same	transactio	,		
See Chiminal Pr						1:	
OINT FAMILY—Probate administration granted Application for refundari. XI of sch. I.	e duty— in respec of duty-	Letters of joi Court	of administ nt property Eccs Act (V	ration, du passing (II of 1870)	ty on—Lett by survivors), sec. 19. D		
See PROBATE DUT	Y	••	•••		(41 -1-1	14	0
Partne	rs—Copa	rceners	nob necesso	urily parti	rers—Suit	e the	79.0
name of the owner of a 1882), see, 27—Partner	Tirm A	nendmen	t—Civil P	roccdure C	ode (Act. X)	V of	
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JOINT FAMILY—Hindu Law—Joint Hindu family—Manager—Arbitration— Power of manager to refer a dispute to arbitration—Award—Minors bound by the award.

See HINDU LAW

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JURISDICTION—Revisional Jurisdiction of High Court—Criminal Proceduse
Code (Act V of 1898), secs. 423, 439—Presidency Magistrate—Discharge of
accused person under sec. 209 of Criminal Procedure Code (Act V of 1898)—
Order of discharge set aside by High Court and order made that accused be
arrested and committed for trial at the Sessions of the High Court—Practice—
Procedure—Sufficient ground for committing for trial, what is.] Under sections
439 and 423 of the Criminal Procedure Code, the High Court has jurisdiction to
set aside an order of discharge passed by a Presidency Magistrate, if such
preliminary be necessary, and to direct that a person improperly discharged of an
offence be arrested and forthwith committed for trial.

The fact, that by section 439 of the Criminal Precedure Code (Act V of 1898) the High Court in its revisional jurisdiction may exercise all the powers given to it as a Court of Appeal (by section 423), except (see paragraph 4) the power of converting a finding of acquittal into one of conviction, seems to point to the conclusion that all other powers not expressly excluded may be exercised by the High Court as a Court of Revision.

The words in section 209 of the Criminal Procedure Code "sufficient ground for committing" mean, not sufficient ground for convicting, but refer to a case in which the evidence is sufficient to put the accused on his trial, and such a case arises when credible witnesses make statements which, if believed, would sustain conviction. It is not necessary that the Magistrate should satisfy himself fully of the guilt of the accused before making a commitment. It is his duty to commit when the evidence for the prosecution is sufficient to make out a primit flucte case against the accused, and he exercises a wrong discretion if he takes upon himself to discharge an accused in the face of evidence which might justify a conviction.

EMPEROR v. VARJIVANDAS ...

(1902) 27 Bom. 84

Small Cause Court—Registrar of Small Cause Court—Saustian to prosecute granted by Registrar—Revocation of sauction—Chief Judge cun revoke it as a public officer—Jurisdiction of Small Cause Court to revoke the sanction—Presidency Small Cause Courts Act (XV of 1882), sec. 35—Criminal Procedure Code (V of 1898), sec. 195.

See SMALL CAUSE COURT

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Defunction in Government Resolution—Secretary of State, liability of, to be sued—Governor and Members of Council, liability of—Let of State—Government servants, powers of Government over—Liability to be distained or consured—Discovery—Privilege—Privileged document—Official communication absolutely privileged—Notice of suit, what is sufficient—Coul Providere Coda (Act XIV of 1882), sees. 416 and 421.] The plaintiff, who was fluxur Depart Collector of Poons and as such exercised magisterial and rovenue functions, such the Secretary of State for India in Council for defamation. The alleged defamation was contained in a Resolution of the Bombay Government dated the Cth November, 1899, which after reciting the substance of certain papers which had been laid before Government, stated that after earcful consideration of the facts disclosed in those papers and of the explanation tendered by the planniff the Governor in Council had come to the conclusion that the plaintiff had have guilty of misconduct reflecting gravely on his reputation for honesty and trustworthiness. The Resolution then set forth the penalties indicted in respect of the sail misconduct. The defendant (inter alia) contended that the suit was not maintainable.

Held, that the Court had no jurisdiction and that the suit was not maintainable on the following grounds:

- (1) The Governor of Bombay and Members of Council are by statute exempt from the jurisdiction of the High Court so far as acts done in their public capacity are concerned. That being so, no action lies against the Secretary of State for India in Council in respect of such acts of the Governor and Members of Council.
- (2) The Secretary of State can only be sued in respect of those matters for which the East India Company could have been sued, viz., matters for which private individuals or trading corporations could have been sued or in regard to those matters for which there is express statutory provision. No suit would lie against the East India Company in respect of acts of state or acts of sovereignty, and therefore no suit in respect of such acts lies against the Secretary of State in Council.
- (3) The plaintiff was a public officer, whose employment was one which could only be given to him by the Sovereign or the agents of the Sovereign. Such public servants hold their offices at the pleasure of the Sovereign and are liable to dismissal at his will and pleasure, if the power of dismissal is not limited by statutory provision. The power of dismissal includes all other powers (e.g., of reduction or censure). It is open to Government by Resolution or otherwise to consure or reprimend an officer.
- (4) The Resolution complained of by the plaintiff being an official communication was absolutely privileged. It could not be put in evidence or produced in Court and no secondary evidence of it could be given. In respect of such official communications no allegation of malice is allowed and no proof of malice takes away the privilege. No action, therefore, could be based on any libel, however malicious, contained in the Resolution.

It was contended for the defendant that the notice of action given by the plaintiff under section 424 of the Civil Procedure Code (Act XIV of 1882) was insufficient, imagine as it did not allege malice, while in his plaint the plaintiff charged malice against the officers of Government who were parties to the issue of the Resolution.

Held, that the notice was sufficient. Such a notice is sufficient if it substantially fulfils its object in informing the parties concerned generally of the nature of the suit intended to be filed.

JEHANGIN M. CURSETJI v. SECRETARY OF STATE FOR INDIA...(1902) 27 Bom. 189

JULISDICTION—Improvement Act (Bom. Act IV of 1898)—Legislative powers of (revernor of Bombay in Council, jurisdiction of High Court to consider whether ultra rives—Subordinate Legislature—Creation of new Courts—Land Acquisition Act (I of 1894)—Indian Councils Acts, 1861 and 1892—Questions of policy, High Court's power to discuss—Tribunal established by Improvement Act not a Court—Notices—Formality, no injury caused by error in—What defects vitiate an Act—Civil Procedure Code (Act XIV of 1882), sec. 424—Injunction against Secretary of State—Ex parte injunction when not to be granted—Notice of swit.] In the year 1893 certain improvements were projected in the City of Bombay, and at Act, called the City of Bombay Improvement Act, 1898, was passed, giving to a Board thereby constituted certain powers with a view to carry these improvements into effect.

On the 25th of September, 1902, there was published in the Bombay Government Gasette a declaration purporting to be in pursuance of the Act, stating that the Governor of Bombay in Council had sanctioned a street scheme made by the Trustees for the Improvement of the City of Bombay under the provisions of the Act (that being the style of the Board thereby constituted), and that certain lands, including those in suit, were "needed to be acquired by the said Trustees for the purposes of executing the said street scheme" and were required for a public purpose.

The plaintiff received notices from the Special Collector (defendant 3) stating that certain premises therein mentioned were about to be taken up by Government under Act I of 1894 (Land Acquisition Act), and that the said properties were to be acquired under the said Act. The notice did not purport to be issued under the City of Bombay Improvement Trust Act.

Held, as the Improvement Act did not prescribe that the notice should be expressed to be under that Act, there was no omission of a formality directed by the Act, and that the plaintiff had not been shown to have been in any way misled or damnified by what was at most a misdescription.

One of the Special Collectors, having made an award of the compensation to be allowed, gave notice to the plaintiffs to hand over possession. The plaintiffs thereupon commenced this suit against the Secretary of State for India in Council and the Trustees for the Improvement of the City of Bombay. The Special Collector was subsequently added as a party.

It was contended by the plaintiffs that the Improvement Trust Act was ultra vires of the Bombay Legislature.

Held, that the Governor of Bombay in Council is a subordinate Legislature, so that the High Court has the right, and is charged with the duty, of deciding judicially whether the impugned legislation is within the scope of its authority.

Held, further, that the Act was not ultra vires in that it amended or repealed the Land Acquisition Act so far only as it affected a particular corporation in a particular locality. The reference to the "province" in section 5 of the Indian Councils Act, 1892, is merely for the purpose of defining the limits of legislative operation and in no way imposes the condition that all legislation should affect the whole of that area.

Query: Whether the Land Acquisition Act is amended or repealed by the Improvement Act, having regard to the fact that the Board of Trastees is not a company within the meaning of the former Act, while the compensation is not payable out of the public revenues or out of any fund controlled or managed by a local authority.

It was further contended that the Improvement Act did not comply with the provisions of the Indian Councils Act, 1861, in that it was not in fact "for the peace and good government" of the Presidency.

Held, that the High Court had no jurisdiction to discuss the policy of the Act.

It was further contended that the Act was vitiated in that it created a new Court and thereby interfered with the functions and jurisdiction of the High Court.

As to this it was held (1) that the tribunal created by the Act was not a Court and was therefore free from the control and supervision of the High Court except where an appeal was sanctioned by its President; (2) that the Improvement Act could not confer on the High Court jurisdiction to entertain appeals from such a tribunal; (3) that the whole Act was not vitiated merely by this defect in the prescribed machinery for ascertaining the compensation payable; (4) applying the principle of the Colonial Laws Act, 1865, to the Improvement Act, the provisions for taking possession are not void.

It was contended on behalf of the Secretary of State that having regard to section 424 of the Civil Procedure Code, the suit was not maintainable against him as no notice of suit had been given.

Held, that in the circumstances of this case no injunction could be claimed against the Secretary of State, and therefore the suit was not maintainable without notice.

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Held, that the decree in that suit was an adjudication that the defendant continued in possession after the date of the expiry of the kabuláyat as tenant from year to year and was liable to payment of rent for the years then sued for, and that he would be liable to the rent now sued for unless he proved that after the decree in the suit of 1897 he gave such notice to the plaintiff as had in fact terminated the tenancy, and unless he put the plaintiff in the way, if he desired the facting on that notice by receiving from the defendant as managing Khot what the plaintiff would be entitled to receive if the tenancy by sufferance had continued.

BALAJI RAGHUNATH v. RAMCHANDRA

(1902) 27 Bonn. 262

LANDLORD AND TENANT—Permanent tenancy—Void lease—Lessee's adverse possession—Disclaimer of landlord's title to evict—Estoppel—Unregistered lease -Admissibility in evidence-Ratification-Acquiescence-Submission-Limitation Act (XV of 1877), sch. II, arts. 120, 139 and 144-Evidence Act (I of 1872), sees. 115 and 116—Registration Act (III of 1877), sec. 49—Panch Mahals.] One Dipsangji, the Thakore of Kanjeri in the Panch Mahals, died on the 7th August, 1877, leaving him surviving the plaintiff Fatesingji, who was born on the 8th December, 1874. The Panch Mahais had been ceded by Seindia to the British Government in 1861, but by Act XV of 1874, Act XX of 1864, the Bombay Minor's Act, had been declared not to be applied by that district. Act XV of 1874 came into force on the Sth December, 1874. On the 29th August, 1877, the Government of Bombay sanctioned the attachment of all the property of the plaintiff's deceased father and appointed Mr. Wilson, the Extra Assistant Collector of the Panch Mahals, to manage the estate during the minority of the heir, and from that time the plaintiff's estate was under the management of the Collector for the time being of the Panch Mahals. Before 1881 the defendant had been applying for a lease to him of certain waste lands in the plaintiff's estate, and in June and December, 1881, and February, 1884, three leases (Exhibits 59, 60 and 61) were granted to the defendant of portions of such land by the Collector purporting to act on behalf of Government, but no specific sanction of Government was obtained to the leases. These three leases were not registered. The Bombay Minor's Act came into force in the Panch Mahals in 1885, and in 1886 the Collector obtained a certificate of administration to the plaintiff's property under that Act. The plaintiff came of age on the 8th December, 1895, but the administrator did not hand over his property to him on that day. On the contrary the then Collector, by his own order, dated the 20th November, 1895 (Exhibit 142). and without the sanction of any superior authority, directed that the attachment of the estate was not to be removed for the present, and in fact it continued until the plaintiff received charge of his property on the 16th January, 1897. In the meantime, viz., on 30th May, 1896, the Collector executed a consolidated lease of the lands comprised in Exhibits 59, 60 and 61 to the defendant without any sauction from the Government or the District Court by which he had in the first instance been granted a certificate of administration (Exhibit 62). This lease was duly registered. In January, 1900, the plaintiff informally required the defendant to give up possession of the lands he was then in possession of (Exhibit 140), and on the 13th January the defendant claimed to hold the lands under Exhibit 62, and on the 15th January, 1900, the plaintiff brought the present suit to have it declared that the defendant was only a cultivator and to be put in possession of the lands. In his written statement the defendant rested his claim on the lease. Exhibit 62. Subsequently, however, in case that might be held to be inoperative he full tack upon the leases, Exhibits 59, 60 and 61.

Held, (1) that the mere fact that the plaintiff had received through his tabitities instalments of rent did not amount to a ratification of the lease of the Soth May 1896 (Exhibit 62), though it might have been effectual as an acknowledgment of a yearly tenancy.

It was contended that the action of the Collector was ratified by Government by their Resolution No. 5008 (Exhibit 100) which however was subsequent to the appointment of the Collector under Act XX of 1864 whereby the guardianship of Government had determined.

Held (per Batty, J.), that there can be no ratification by a person who at the time of the ratification could not have done the act himself even though he had the power to do it, when the original act unauthorised by him was done.

The defendant contended that he had been in possession as of right and that his possession was therefore adverse and had continued for over twelve years, that the defendant became a permanent tenant under the plaintiff's guardian, the Collector; that the plaintiff had not repudiated the act of his guardian within three years after he attained majority and consequently that in any view of the case his claim was time-barred.

Held: It is well established that there can be adverse possession of a limited interest in property as well as of the full title as owner. As it appeared that the defendant agreed to go into possession under rules which would give him a permanent tenancy and that he had ever since he went into possession claimed to be in as a permanent tenant, he had therefore since 1881 and 1884 been in adverse possession as a permanent tenant.

Held, further, that as the plaintiff had not brought the suit within three years of attaining his majority, the defendant had obtained by adverse possession a right to hold the lands as against the plaintiff as a permanent tenant.

Per Batty, J.—The authorities show that a tenant in India is not precluded by an admission of tenancy from showing that the nature of the tenancy asserted by him to the knowledge of the landlord has been for the period prescribed by the Limitation Act pro tanto adverse to the right to evict either at will or on notice given.

A manifest assertion by the tenant to the knowledge of the person representing the landlord's interests of a right inconsistent with that claimed by the landlord to treat him as a tenant-at-will or from year to year would be a disclaimer of the landlord's title: Fixian v. Most (1881), 16 Ch. Div., 730, relied on.

A landlord merely by receiving rent cannot preserve his right to other claims continuously denied by the tenant.

The fact that such assertion and enjoyment are not challenged does not change their adverse character when once the necessity for challenging it has arisen.

It was contended that the unregistered leases even though they required registration could still be looked to for the purpose of ascertaining what was in the contemplation of the parties.

Held (per Batty, J.): "A document inadmissible under section 49" (of the Registration Act) "could not, I think, be used as evidence of delivery of possession." But seeing that the Legislature has advisedly rejected in the more recent Act the phrases which made such unregistered documents absolutely incapable of being received in evidence at all and has very gnardedly stated the purposes for which they shall not be received, I think, in the absence of authority to the contrary, an unregistered document inadmissible for the purpose of affecting immoveable property or of any transaction affecting immoveable property may yet be looked to, not in any way as creating a title, or as showing a transaction that affected the property, but merely as containing a clear and exhaustive statement of the adverse possession which was set up by a person whose claims were admittedly limited to the rights enumerated in such document.

TRAKORE PATESINGJI V. BAMANJI A. DALAD

... (1903) 27 Bom. 515

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Held, that the defendant we privilege. It was the duty about persons asking for and complained of was made by his to his superior officer. The me for the purpose of getting the officer had never asked his opidestroy the privilege, in the abwas actuated by malice, or that honestly formed.	holding lice m in the disc ere fact that plaintiff's inion about	nses for arm charge of a the defenda license canc the cancell	police omen us, and the public du nt made to elled, tho ation, is	er to make re the communicaty which he the communicated his sup- ugh his sup- not sufficient	eports eation owed ation perior
NARASIMHA v. BALWANT		•••		.(1903) 27 B	omb. 585
LICENSE—License of public con grant licenses—Discretion to Specific Relief Act (I of 1877), of 1863 empowers the Commiss public conveyances and provides any such license for any conve- found or otherwise unfit for the the Commissioner is bound to er is not an absolute one, but one acquainted with the conveyance an individual carriage, is lit for	sec. 45—Prioner of Pothat he "mi that he "mi eyanee which conveyance xercise his di which is to b	actice]. See lice in Bon ay in his d in he may c of the pub scretion in a e exercised:	Act FI ction 6 of mbay to a iscretion ousider to olic." Un each case, after he h	er of Polic of 1863, see Bombay Ac grant license refuse to g be insuffici der this see This discre	e to . G t VI s for rant enly tion

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When it appeared that the Commissioner of Police had approved of a certain pattern of victoria as a public conveyance in Bombay and refused to license victorias which did not conform to that pattern,

Held, that his refusal on that ground was illegal, and under section 45 of the Specific Relief Act (I of 1877) he was ordered to issue the licenses asked for.

Per Russell, J.—Under rule 577 of the High Court Rules all applications under section 45 of the Specific Relief Act (I of 1877) should be made by motion and not by petition.

GELL v. TAJA NOORA

...(1903) 27 Bom. 307

LIMITATION—Adverse possession—Hindu Law—Gift—Donor not in possession—Donee not placed in possession—Gift of an undivided share—Stranger to the gift disputing its validity.

See HINDU LAW ...

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Suit is instituted when plaint presented—Plaint presented insufficiently stamped—Deficiency subsequently paid—Limitation Act (XV of 1877), sec. 4—Civil Procedure Code (Act XIV of 1882), secs. 48 and 54—Account—Barred item—Interest not allowed on barred item of account.] Where a plaint was presented on the 14th September, 1900, with an insufficient stamp, but the deficient stamp duty was paid on the 18th September, 1900,

Held, that for the purpose of limitation the suit was instituted on the day on which the plaint was presented, viz., the 14th September, 1900, and not on the day on which the deficient stamp duty was paid, viz., the 18th September, 1900.

In an account, interest cannot be allowed on items that are barred by limitation. Interest is but an accessory, and when the principal is barred, the accessory falls along with it.

DHONDIRAM v. TABA SAVADAN

...(1902) 27 Bom. 330

LIMITATION ACT (XV OF 1877), SCH. II, ART. 91—Specific Relief Act (I of 1877), sec. 39—Band—Suit to have the band adjudged void—Limitation.], Article 91, schedule II, of the Limitation Act (XV of 1877), applies to a suit brought under section 39 of the Specific Relief Act (I of 1877) to have a bond adjudged void and to have it delivered up and cancelled

BAKATBAM v. KHARSETJI

...(1903) 27 Bom. 560

SCH. II, ART. 118—Adoption—Declaration that the adoption is invalid—Knowledge—Death of adopter—Dute from which limitation runs.] B adopted N on the 17th March 1891. On the 30th March 1897, B died. The plaintiffs filed this suit on the 14th April, 1899, for a declaration that the adoption of N was invalid.

Held, that the suit not having been brought within six years from the 17th March, 1891, the date on which the plaintiff came to know of the adoption, was barred under article 118 of schedule II to the Limitation Act (XV of 1877); and that the fact that B died within six years of the date of the suit could not prevent the bar of limitation.

RAMCHANDRA v. NABAYAN

...(1903) 27 Bom. 614

SCH. II, ARTS. 120, 139 AND 144—Evidence Act (I of 1872), secs. 115 and 116—Registration Act (III of 1877), sec. 49—Panch Maháls—Landlord and tenant—Permanent tenancy—Void lease—Lessee's adverse possession—Disclaimer of landlord's title to evict—Estoppel—Unregistered lease—Admissibility in evidence—Ratification—Acquiescence—Submission.

See LANDLORD AND TENANT

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LIMITATION (ACT XV OF 1877), sen. II, art.184—Alienation of trust property by guru of a math for valuable consideration—Suit by his successor to recover possession—Trustee, alienation by a—Adverse possession—Limitation.] The guru or manager of a certain math, who, as trustee, held certain property belonging to the math, sold it for value to the defendant in 1871. In 1898 his successors sued to recover it, contending that the vendor had no power to alienate the trust property.

Held, that the suit was barred by limitation under article 134 of the Limitation Act (XV of 1877).

DATTAGIRI v. DATTATRAYA

... (1902) 27 Bom. 363

on condition of service—Alienation—Limitation.] Where trust property is alienated by the trustees and the alienees have been in possession by purchase for more than twelve years, the suit as one for the purpose of restoring the property to the trust must fail as barred by article 134, schedule II of the Limitation Act (XV of 1877).

SAGUN BALKRISHNA v. KAJI HUSSEN

.. (1903) 27 Bom. 500

Manager—Trustee—Lease by manager—Suit by subsequent manager to recover the property—Adverse possession.] In 1845, one Krishna Swami granted a mulgeni (perpetual) lease of the land in question to the defendants' grandfather, Haumanna. The lower Appellate Court held that at the date of the grant Krishna Swami was manager of the temple Shri Raunchandra Devasthán, and that the land at that time belonged to the temple. In 1854 Krishna Swami's successor, the then manager of the temple, sued Hammanna (the lessee) for enhanced rent, but the latter pleaded his lease and the suit was withdrawn. In 1855 the then manager brought a similar suit against the defendants with a similar result. In April, 1900, the present plaintiff, as manager of the temple, filed this suit to eject the defendants, alleging that they were yearly tenants and that he had given them notice to quit. He contended that his predecessor, Krishna Swami, had no power to alienate the property of the temple.

Held, that the suit was barred by limitation. If the original lessor was not a trustee for the temple of the land in question, then the defendants had held by adverse possession, and the suit was barred under article 14t of the Limitation Act (XV of 1877). If the original lessor was a trustee, he had, as such, alienated the land for valuable consideration and the suit was barred by article 134 of the Limitation Act. The fact that there was a lease to the defendants; and not an absolute alienation, made no difference. A mulgeni lease is a purchase pro tanto of the interest thereby assured.

NARAYAN v. SHRI RAMCHANDRA ...

(1908) 27 Bom. 373

gage—Redemption—Adverse possession as against mortgagen—Possession of tuneed under an agreement with mortgagee—Notice to mortgager of such possession—Limitation Act (XV of 1877), sch. II, art. 144.] The plaintiffs ided this soit to redeem a mortgage with possession of certain land dated 18th October, 1866. The plaintiffs were the daughters and grandson of the mortgager (the willow of one Kondi Aga). The first defendant was the grandson and heir of the mortgage (Nageshrao). The second and third defendants were nephews of kendi Aga. They denied that the plaintiffs being females had any right to the property, and they alleged that they themselves had been in possession since 1885 under an agreement with Nageshrao, the original mortgagee, and they contended that the plaintiffs claim was, therefore, now barred by limitation. It appeared that in 1885 defendants 2 and 3 had claimed to be the heirs of Kondi Aga, the husband of

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the mortgager, and had entered upon the land. The mortgagee thereupon filed a suit against them under section 33 of the Dekkhan Agriculturists' Relief Act (XV11 of 1879), which, however, was settled by an agreement before the coneiliator on the 31st August, 1885, whereby defendants 2 and 3 undertook to pay off the mortgage and it was agreed that they should remain in possession of the land. This agreement was filed as a decree on the 27th November, 1885, under section 44 of the Act. The last instalment of the mortgage-debt was paid to the first defendant by defendants 2 and 3 in September, 1897. The plaintiffs had no notice or knowledge of any of the above-mentioned proceedings. On 5th October, 1897, the plaintiffs filed this suit to redeem the mortgage of 1866 and to recover possession of the lands. The lower Courts held that the plaintiffs were the heirs, but that the suit was barred by limitation under article 144 of schedule II of the Limitation Act (NV of 1877), inasmuch as defendants 2 and 3 had been in adverse possession for more than twelve years. On appeal to the High Court,

Held, (reversing the decree of the lower Court and remanding the case) that the suit was not barred. The possession of the defendants was not adverse to the plaintiffs, inasmuch as there was no notice or knowledge, or circumstance that could have given notice or knowledge, to the plaintiffs (mortgagors) that the defendants' possession was in displacement of their rights. They had no reason to know that their rights were invaded, and until they had such reason there could be no necessity for them to take action.

TARUBAI v. VENKATRAO

... (1902) 27 Bom. 43

MITATION ACT (XV OF 1877), scn. II, art. 1754-Suil to recover possession — Death of the plaintiff pending suit—Legal representative—Procedure—Civil Procedure Code (Act XIV of 1882), secs. 365, 367, 588, cl. (18) and 591.

See CIVIL PROCEDURE CODE

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-ART. 179-Instalments-Instalment decree-Default in payment of instalments-Subsequent payment and acceptance of overdue instalments-Waiver.] A decree obtained on the 27th June, 1887, by a morigagee against his mortgagor directed that the sum of Rs. 1,050 should be paid by yearly instalments of Rs. 55, the instalments to be paid in the month of April in each year. It further provided that, in ease of default being made in the payment of any two consecutive instalments, the plaintiff should recover possession of the mortgaged property. The defendant did not pay in April, 1891, or April, 1892, the insalments due in those months as ordered by the decree, but he paid them, and they were accepted by the plaintiff, in the months of May, 1891, and May, 1892, respectively. He also paid subsequent instalments, and up to 1805 no single instalment remained unpaid at the date at which that immediately succeeding it became due. But he again failed to pay two consecutive instalments, viz., those due in 1896 and 1897, and he paid nothing subsequently. In July, 1899, the plaintiff applied for execution of the decree contending that his right to execution arose in 1897 under the terms of the decree. The lower Appeal Court held that the plaintiff's right to execution had arisen in 1892 and that his present application was therefore barred by limitation. On appeal to the High Court,

Held, (by the Full Bench, reversing the decree af the lower Court) that having regard to the payment and acceptance of instalments in this case subsequently to 1802, the parties had been remitted to the same position as they would have been in if no default had then occurred and that on the subsequent default in 1897 the plaintiff's right to execution arose and that consequently his application in 1899 was in time.

Per Jenkins, C. J.: - The true view appears to me to be that, though there may be a failure to pay punctually under an instalment decree, still the subsequent conduct of the parties may preclude either of them from afterwards asserting that

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Page Held, (reversing the decree) that the defendant (mortgagee) was entitled to the additional interest. The defendant (mortgagee) was a minor. It was therefore requisite that a guardian ad litem should be appointed both to receive service of the notice of deposit under section 83 and to take the deposit out of Court. It could not be said that the mortgagor (plaintiff) had completely performed his part until he had procured the appointment of a guardian ad litem for the above purpose. This was not done prior to the 25th October, 1899. Consequently the mortgagee was entitled under the mortgage to the interest for the year commencing on that day. PANDURANG v. MAHADAJI ... (1902) 27 Bom. MORTGAGE-Redemption-Adverse possession as against mortgagor-Possession obtained under agreement with mortgagee-Notice to mortgagor of such possession - Limitation Act (XV of 1877), sch. II, art. 141-Adverse possession. See Adverse Possession Transfer of Property Act (IV of 1882), sec. 50—Attestation of mortgage-bond—Meaning of the word "attested"—Attestation in the presence of the mortgagor after having received from him a personal acknowledgment of his signature.] A mortgage-bond was signed by the mortgagor, was attested by three witnesses and was duly registered. In a suit for the mortgage-debt it appeared from the evidence that none of the attesting witnesses had actually seen the execution of the deed by the mortgagor, but must have attested merely on the mortgagor's admission of his signature. The lower Courts held that this was not sufficient under section 59 of the Transfer of Property Act (iV of 1882), and that the mortgage was, therefore, invalid. On appeal to the High Court, Held, that the attestation was sufficient. A mortgage-deed is attested within the meaning of section 59 where the witnesses have signed it in the presence of the mortgagor after having received from him a personal acknowledgment of his Abdul Karim v. Salimun ((1899) 27 Cal. 190) dissented from. RAMJI v. BAI PARVATI ... (1902) 27 Bom. 91 -Civil Procedure Code (Act XIV of 1882), sec. 257-A -- Satisfaction of decree by a mortgage without sanction of Court-Mortgage band void. See CIVIL PROCEDURE CODE Subsequent money bonds-Provision as to the payment of the bonds before redemption—Clogging the equity of redemption—Ones a mortgage always a mortgage, and nothing but a mortgage. In the year 1869 the plaintin's deceased father mortgaged his lands with possession to the defendants' deceased father under two mortgage-deeds, and in the year 1882 the plaintiff passed two money bonds to the defendants' deceased father, which contained a clause providing that the amount due on the mortgages should not be paid in redemption of the property unless that which was due on the money bonds was also paid. The plaintiff having filed a suit to redeem the lands, the defendants objected to the redemption under the above clause. PER CURIAN.—Following Noakes & Company, Limited, v. Rice (L. R. (1902) A. C. 24)—a clause which has the effect of clogging the equity of redemption is void: Hari Makadaji v. Ealambhat ((1884) 9 Boia. 283) doubted. RAJMAL v. SHIVAJI ... (1902) 27 Bon. 154 Redemption—Cloy on the equity of redemption—Agreement of subsoft the mortgaged property subsequently to mortgage. It is open to a mortgage. and mortgagee to enter into a contract subsequently to the mortgage for the sale of the marigaged property to the mortgagee.

KANHAYALAE v. NARHAR Suit for redemption—Burden of proof on plaintiff—Proof of specific mortgage.] The plaintiff sued for redemption and to recover possession of

Page.

certain lands, alleging that they had been mortgaged to the ancestors of the defendants about forty-five years before suit. The defendants, who were in possession, denied the mortgage. The Subordinate Judge found the mortgage proved and passed a decree for redemption. On appeal the Judge reversed the decree and dismissed the suit. He was of opinion that the plaintiff was bound to prove a specific mortgage made forty-five years ago as alleged in the plaint and that he had failed to do so. On second appeal,

Held (remanding the appeal), that the real question was whether the defendants were mortgages of the property in question. The plaintiff did not tie himself down to a specific mortgage made at a particular time. He was entitled to succeed if he proved that the land was held by the defendants as mortgages.

Bala v. Shiva ... (1902) 27 Bom. 271

MORIGAGE—Discharge of mortgage—Death of mortgagee—Heirs of mortgagee—Payment of mortgage-debt to one of the heirs.] Where property is mortgaged to a person who subsequently dies leaving two or more heirs jointly entitled to his estate, payment made by the mortgager of the amount due on the mortgage to one of those heirs, without the concurrence of the rest, does not amount to a valid discharge to the mortgager.

SITARAM v. SHRIDHAR (1903) 27 Bom. 292

Usufructuary mortgage—Simple mortgage—Anomalous mortgage—Transfer of Property Act (IV of 1882), see. 58, cls. b and d and sec. 98—Suit by mortgagees for recovery of debt and in default of payment by mortgagors for foreclosure and possession.

See TRANSFER OF PROPERTY ACT 600

MULGENI LEASE, interest acquired under. A Mulgeni lease is a purchase protunto of the interest thereby assured.

NABAYAN v. Shri RAMCHANDRA ... (1903) 27 Bom. 373

MUNICIPALITY—Rombay District Municipal Act Amendment Act (Bom. Act II of 1884), see 30—Executory contract—Breach—Binding character—Suit for damages] In a suit for damages for breach of an executory contract, it is open to the defendant to show that it is not binding on him inasmuch as it is not binding on the plaintiff.

AHMEDABAD MUNICIPALITY v. SCLEMANJI ... (1903) 27 Bom. 618

Bombay District Municipal Act (Bombay Act VI of 1873), secs. 37, 12—Private street—Bulcony projecting over private street—Notice to Municipality—Disobedience of the permission granted by Municipality.] Held, by Chandavarkar and Aston, JJ. (Batty, J., dissenting), that under the District Municipal Act (Bombay Act VI of 1873) a Municipality has power to regulate or control the construction of balconies projecting over private streets.

TRIBHOVAN V. AHMEDABAD MUNICIPALITY ... (1902) 27 Bom. 221

Bombay District Municipal Act (Bombay Act III of 1901), secs. 82 (c), 85—House-tax—Suit for injunction restraining levy of tax—Right to see in Civil Court without first proceeding under sec. 86—Injunction when quanted—Specific Relief Act (I of 1877), sec. 56—Discretion.] The Surat City Municipality served, under section 82, clause (3), of the Bombay District Municipal Act (III of 1901), a notice of demand upon the plaintiff for house-tax due by him. The plaintiff instead of proceeding under section 86 of the Act instituted a suit in the Civil Court for an injunction to restrain the Municipality from recovering the house-tax from him. The lower Courts rejected the claim on the ground that, as the plaintiff had omitted to appeal to a Magistrate under section 86 of the Act, his suit was premature.

Held, that section 86 was permissive merely, and that it did not make it incumbent in every case upon a party complaining of an illegal levy of a tax by a

xlii	GENERAL INDEX.
	$\mathbf{P}_{\mathbf{age}}$
	Municipality to appeal against the action of the Municipality to a Magistrate before suing in a Civil Court But
	Held, also (confirming the decree), that the injunction prayed for in this case could not be granted. By section 56 of the Specific Relief Act an injunction cannot be granted where efficacious relief can be obtained by any other usual mode of proceeding. Section 86 of Bombay Act III of 1901 gave a remedy to the plaintiff, but instead of resorting to it he filed this suit for an injunction. It was discretionary for a Court to grant an injunction and that discretion must be exercised judicially with extreme caution and only in very clear cases. This was not a case of that kind. Chunilal v. Surat City Municipality (1903) 27 Bom. 403
NE(HIGENCE—Railway Company—Negligence in construction of railway—Suit for damage to land by causing water to flood it—Indian Railways Act (IX of 1890), secs. 7-12—Acting in excess of statutory powers in construction of railway—Suit for damages. See Railway Company
	MCE OF SUIT, what is sufficient—Act of State—Jurisdiction—Defamation in Government Resolution—Secretary of State, liability of, to be sued—Governor and Members of Council, liability of—Government servants, powers of Government over—Libality to be dismissed or censured—Discovery—Privilege—Privileged document—Official communication absolutely privileged—Civil Procedure Code (Act XIV of 1882, sees 416 and 424)
	injury caused by error in—Civil Procedure Code (Act XIV of 1898)—Formality, no injury caused by error in—Civil Procedure Code (Act XIV of 1882), sec. 424—Injunction against Secretary of State—Ex parte injunction when not to be tranted. See Jurisdiction
PAR'	TIES—Misjoinder of parties—Plaintiff's discretion as to addition of parties Practice—Procedure. See Practice
T I	Joint family—Partners—Coparceners not necessarily partners— Partnership. See Partnership
C fa gr	"ITION—Inam village granted by Peishwa—Right of management of Inam viperty—Claim that Inam village was impartible—Right of succession—ustom.] The defendant in a suit for partition alleged that his branch of a joint mily to which an inam village had been granted by the Peishwa had under the ant acquired a right to the perpetual management of the village, and claimed on a and other grounds that the village was impartible.
tha the the of	Held, by the Judicial Committee (affirming the decision of the High Court) at "noither by the the terms of the original grant nor of the subsequent orders of a ruling power, nor by family custom, nor by adverse possession has defendant's branch of the family acquired a right to perpetual management the village of Ahire, or in consequence to resist its partition." Advishappa v. Gurushidappa ((1880) 7 I. A. 162: 4 Bont. 494) referred to VINAYAK v. GOPAL
Cir of s with	ERSHIP—Parties—Joint Hindu family—Partners—Corneceners not essarily partners—Suit in the name of the camer of the form—Amendment—ill Procedure Code (Act XIV of 1882), see. 27.] The plaintiff such as owner a firm to recover a debt. The defendants pleaded that the plaintiff was joint has father and brother, and contended that the latter were therefore partners he firm and ought to be joined as plaintiff. The latter were therefore partners

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that the plaintiff's father being joint members of a H been co-plaintiffs. It fur add them as parties, and it t	ther held the herefore di	y and that hat it was to smissed the s	they ought o late to amount. On se	therefore and the pla cond appear	to have int and to
Held, (reversing the deer carrying on business is a follow that all his coparcene to its rights and responsible must be proved by evidence agreed to combine their proposits and losses thereof.	coparcener rs are his p de with his showing th	nanding the in a joint : eartners in th n for its liab at the perso	case), that family, it can at business, ilities. The	although loes not n entitled fact of pa	a person secessarily with him artnership
Held, also, that if on remarker partners, the Court of under section 27 of the Civil entitled to amend.	upht to a	llow them to	ha hronoth	t on the wa	Company
Kasturchand v. Sagarma Vadilal v. Shah Khu	I ((1 892) : sнац	7 Bom. 413)		(1902)	27 Bom. 157
PARTNERSHIP—Civil Proceed dissolution of partnership Attachment of decree for dissolution See Civil Procedure 1		(Act XIV decree—E: f partnership	of 10001 ac	. 070 T	eeree for deeree—
PENALTY—Bond—Instalment rate from the date of the tran See Contract Act	s-Failur	e to pay inst	alments—I	nterest at a	
PLAINT-Suit is instituted whe	n plaint p	resented—Pl	uint prese	nted inous	21 Reiently
stamped—Deficiency subsequ See Civil Procedure (enti y para Jode	• • • •		•••	330
POLICE COMMISSIONER—P. Bombay Act VI of 1863 Specific Relief Act (I of 187 See License	5. Sec. 5 -	Laconse of a	—Discretic	n to refuse yances—Li	cense—
POLICE OFFICER—Police off a cancelled license—Acting Malicious search. See Malicious search	icer search in the di	ing a house i scharge of	inder orders duty—Dish	for arms onesty—A	307 under ction— 590
POSSESSION—Registration Act Unregistered deed accompant deed—Effect of possession— registration—Duty of purcha See Registration Act	icd with p Possession	ossession—S for nurve	ubsequent so ses of noti	tle by reg ce equival	istarcel
Registration Act 1878), sec. 90—Documents to Registration—Constructive n See Registration Act	hirty year	377), secs. 17 s old—Prop	and 50—E. er custody-	vidence Ac –Presump	t (I of tion— 452
PRACTICE—Procedure—Hindu placed in possession—Gift of its validity—Adverse possession discertion as to addition of members of a joint Hindu fathe family property with the ewas applied to the maintenance in the possession of the plaintimother died in 1877, but the	an undivi- m—Limita parties.] mily, but in acception of of their n	ted share—Setion—Misjon The plaint on 1870 they certain land, nother during	tranger to t inder of pa- iff's father a separated which was her lifeting	he gift disp rties—Plai and uncles and partit kept join ne. It rem	ee not outing intiff's were ioned it and nained •

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possession of the plaintiff's father. On 15th November, 1877, the plaintiff's uncles M. and J. by a registered deed gave to their nephew, the plaintiff, their undivided shares in this land. They were not, as already stated, in possession and they did not deliver possession of their shares to the plaintiff or to any one on his behalf. The plaintiff's father (their co-sharer) was in possession and he continued in possession after the gift was made. The plaintiff was at that time, and until 1892, a minor and lived with his father as a member of a joint family. On the 1st January, 1887, his father mortgaged the whole of the land to the second defendant, who at once entered into possession. Subsequently the land subject to this mortgage was sold in execution of a decree against the plaintiff's father and was purchased by one Kirpashankar, Ranchhor. In 1892 the plaintiff attained his majority and on the 2nd January, 1899, he filed this suit against his father (defendant 1) and his father's mortgagee (defendant 2) to recover the land which had been given to him on the 15th November, 1877. Kirpushankar was not made a party to this suit. The lower Court rejected the plaintiff's claim on the ground that the gift to the plaintiff by M. and J. of their undivided shares of land not in their possession, and of which the plaintiff was not put into possession, was invalid. They also held that Kirpashankar should have been a party and that the plaintiff's claim was barred by limitation inasmuch as the mortgagee had held adverse possession since 1st January, 1887, i.e., more than twelve years. On appeal to the High Court,

Held, (reversing the decree of the lower Court) that-

(1) The gift to the plaintiff in 1877 was valid. The donors, in relinquishing their claim to their undivided shares, had done all that was practically necessary and by the registered deed of gift had done all that they could do, and the possession of the father was practically the only mode in which the plaintiff, who was then an infant, could accept or exercise possession. The donors never objected and made no attempt to revoke their gift. No division was necessary, as the whole of the land was in the possession of the plaintiff's father.

(2) The fact that the shares were undivided did not render the gift invalid. This was not a gift by members of an undivided family to an outsider as in Vrandavandas v. Yamunabai ((1875) 12 B. H.C.R. 229). It was a gift by persons who were not members of an undivided family (the plaintiff's uncles having previously separated from his father) to the plaintiff, a member of another coparcenary. No consent was necessary to validate the alienation, nor was there any one who did or could object.

(3) The plaintiff's claim was not barred by limitation. The property did not pass to the mortgagee until 1st January, 1887, and this suit, instituted on 3rd January, 1899, allowance being made for the vacation, was therefore in time.

(4) The auction-purchaser was not a necessary party. The plaintiff was not bound to sue every possible claimant to the land. If he chooses to leave the question that might arise between him and the auction-purchaser to future settlement, he did it at his own risk. He was dominus litis.

JOITABAM v. RAMKBISHNA (1902) 27 Bom. 31

PRACTICE—Costs, security for—Civil Procedure Code (Act XIV of 1882), sec. 380—Two plaintiffs, father and daughter—Suit for damages for breach of promise to marry.] A Parsi father and daughter (plaintiffs 1 and 2) sued for Rs. 10,000 as damages for the defendant's breach of his promise to marry the daughter (plaintiff 2). The defendant alleged that the suit was really a sait for the benefit of the father, who sought to make money out of his daughter's betrethal: that he (the father) was an undischarged insolvent and not in a position to pay costs if he last the sair, and that the second plaintiff (the daughter) had no property in India. The defendant took out a summons under section 380 of the Civil Procedure Code, requiring the plaintiffs to give security for costs. The Court ordered that security for costs should be given.

Bomanji Jamsetji v. Nusserwanji

... (1902) 27 Bom. 100

(1903) 27 Bom. 394

and 591—Limitation Act (XV of 18 possession—Death of the plaintiff pendi	IV of 1882), secs. 365, 367, 588, cl. (18 77), sch. II, art. 175-A—Suit to recover ng suit—Legal representative—Procedure.	4.5
See CIVIL PROCEDURE CODE	•••	16
tatives of deveased appellant not brought surviving appellant—Power of the decree.] In a suit for partition, the lor Two of the defendants, who denied the as their own, filed a joint appeal. Pher representatives were not brought however, proceeded with the appeal and Court was reversed and the plaintiff second appeal to the High Court and cought not to have heard the appeal in that that Court had no power to reverse to the deceased appellant. Held, that, as the two defendants had	Code (Act XIV of 1882), secs. 362, 544 rellant pending appeal—Legal represent on the record—Appeal proceeded with Court to hear the appeal and reverse whole or Court passed a decree for the plaintiffs plaintiffs' right and claimed the property anding the appeal one of them died, and in the record. The surviving appellant, at the hearing, the decree of the lower is suit dismissed. The plaintiffs filed a patiented that the lower Appellate Court is much as it had abated, or at all events the lower Court's decree so far as it related appealed on grounds common to them were to hear the appeal and to deal with	
CHINTAMAN v. GANGABAI	(1903) 27 Bom.	28
Specific Relief Act (I of 187), sec. 45-Livense-License of public	
See Specific Relief Act		307
50—Offence under sec. 50 a criminal assustain conviction and sentence—Opposibe stated in clear terms.] Insolvents windian Insolvent Act of wilfully preventiof certain papers relating to their affairment. Held, that the proceedings, so far as the a criminal case.	fat. 11 and 12 Vict., c. 21), sees. 47 and force—Charge, Sc., must be framed to a greditor—Grounds of opposition should be found guilty under section 50 of the ground sentenced to three months' imprisonal sentenced in imprisonment, amounted	
all criminal cases it is necessary that the conviction, as a foundation for the sent	Sandau ((1844) 1 Phillips 445), that "in ere should be a charge, a finding and a nce": and that as there was no charge, made. Section 47 of the Insolvent Act ands of opposition to a debtor's discharge d before the hearing.	

Procedure—Privy Council—Application for leave to appeal—Companies Memorandum of Association Act (XII of 1895), sees. 9 and 10—Appeal against order passed under the Act—Test of peruniary sufficiency or of substantial question of law—Civil Procedure Code (Act XIV of 1882), sees. 594, 595 and 647—Case otherwise fit for appeal.] A petition by a Company for the confirmation of a special resolution altering the Memorandum of Association was dismissed by the High Court.

In re VALLADHDAS

The Company desired to appeal to His Majesty in Council. Leave to appeal was opposed on these grounds: (1) that no appeal lay under the Memorandum of Association Act or Companies Act; (2) that the pecuniary test was not satisfied; (3) that there was no substantial question of law.

Held, that the order dismissing the petition was a "decree" within the definition of that term contained in section 594 of the Code.

Held, as to objections (2) and (3), that the only question was whether the case was a fit one for appeal to the King in Council within the meaning of clause (b)

Held, further, that having regard to the fact that the commercial and financial position of the Company might be seriously affected by the questions at issue, and to the importance to Indian Companies generally of having such rights precisely defined, the case ought to be certified as a fit one for appeal to His Majesty in

Held, further, that the proceedings fell within Chapter XLV of the Civil Procedure Code.

BOMBAY BURMAN TRADING CORPORATION v. DORABJI C. SHROFF (1903) 27 Bom. 415

PRACTICE-Full Court-Small Cause Court-Presidency Small Cause Courts Act (XV of 1882), secs. 9 and 38—Decision by a single Judge on evidence—Reversal of decree by Full Court-Jurisdiction.

See SMALL CAUSE COURT ...

... 563

Procedure—Pending suit—Another suit based on the defence in the first suit—Specific Relief Art (I of 1877), sec. 39—Concellation of instrument.]
On the 16th March, 1899, the firm of Chhaganlal Haribhai brought Suit No. 96 of 1899 against Dhondu and Baba to recover a sum due on a bond passed by them to the firm. The defence pleaded that the bond was void, being passed for the balance due on wagering transactions. While this suit was pending, on the 13th June, 1899, Dhendu (one of the defendants in the suit) brought Suit No. 167 of 1899, to have the above-mentioned bond cancelled and delivered up to him, under section 39 of the Specific Relief Act (I of 1877). The Subordinate Judge decided both the suits together; he dismissed the first suit and allowed plaintiff's claim

Held, that the form of specific relief provided for by section 39 of the Specific Relief Act (I of 1877) was founded upon the administration of protective justice for fear (quia timet); and that there could be no fear, in the second suit, that the plaintiff would suffer serious injury if he did not bring the suit, for the plea which was the foundation of the second suit was raised by him in the defence to the previous suit.

CHHAGANLAL v. DHONDU

... (1903) 27 Bom. 607 PRESIDENCY MAGISTRATE-Discharge of accessed pers n under see. 260 of Criminal Procedure Code (Act V of 1890) - Order of discharge set aside by High Court and order made that accused be arrested and committed for trial at the Sessions of the High Court—Practice—Procedure—Sufficient ground for committing for trial, what is—Jurisdiction—Revisional jurisdiction of High Court— Criminal Procedure Code (Act V of 1:98), secs. 423 and 438.

See JURISDICTION ...

PRIORITY-Unregistered deed accompanied with passession-Subsequent sale by registered deed—Effect of possession—Possession for purposes of other equivalent to registration—Duty of purchaser to inquire as to nature of possession—Registration Act (III of 1877), sees. 19, 50—Registration.

See REGISTRATION ACT

PRIVILEGE attaching to statements contained in Government It station. Sec JURISDICTION

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CHILDRAD INDEA.	zlvii
PRIVILEGE—Subord nate Government Officer making a report to his ex Imputations contained in the report.	Page
See Libel	585
PRIVY COUNCIL Appeal to Privy Council—Appeal dismissed for want secution—Costs—Order made by the High Court that the appellant she the respondent's costs of application for leave to appeal.] Where are the Frivy Council was dismissed for want of prosecution, the High Court the appellant to pay the respondent's costs of the application for leave to appeal Milson v. Carter (1893) Ap. Ca. 638) followed.	ould pay appeal to

Application for leave to appeal—Companies Memorandum of Association Act (XII of 1895), sees. 9 and 10—Appeal against order passed under the Act—Test of pecuniary sufficiency or substantial question of law—Civil Procedure Code (Act XIV of 1882), sees. 591, 595 and 647—Decree—Definition of decree—Case otherwise fit for appeal—Practice—Procedure.] A petition by a Company for the confirmation of a special resolution altering the Memorandum of Association was dismissed by the High Court. Memorandum of Association was dismissed by the High Court.

SECRETARY OF STATE FOR INDIA 9. JANAEDAN GANFATRAO

The Company desired to appeal to His Majesty in Council. Leave to appeal was opposed on these grounds: (1) that no appeal lay under the Memorandum of Association Act or Companies Act; (2) that the pecuniary test was not satisfied; (3) that there was no substantial question of law.

Held, that the order dismissing the petition was a "decree" within the definition of that term contained in section 594 of the Code.

Held, as to objections (2) and (3), that the only question was whether the case was a fit one for appeal to the King in Conneil within the meaning of clause (b) of section 595.

Held, further, that having regard to the fact that the commercial and financial position of the Company might be seriously affected by the questions at issue, and to the importance to Indian Companies generally of having such rights precisely defined, the case ought to be certified as a fit one for appeal to His Majesty in

Held, further, that the proceedings fell within Chapter XLV of the Civil Procedure Code.

BOMBAY BURMAN TRADING CORPORATION v. DORABJI C. SHROFF ... (1903) 27 Bom. 415

PROBATE - Executor - Will-Probate granted to some of the executors - Executors who have not proved may call for inventory and account from executors who have proved and are managing the estate. See EXECUTOR

... 281 PROBATE DUTY—Letters of administration, duty on—Letters of administration granted in respect of joint property passing by survivorship—Application for refund of duty—Court Fees Act (VII of 1870), sec. 19 D, and art. XI of sch. I.] A Hindu died intestate leaving two sons who were joint with him. Part of the deceased's estate consisted of two sums of Rs. 5,000, one of which was deposited with the Bank of Bombay and the other with a Commercial Company. Both the Bank and the Company refused to pay these sums unless letters of administration were obtained. Letters of administration were accordingly obtained in respect of these portions of the estate of the deceased and a sum of Rs. 207-2-0 was pair as duty thereon under article XI, schedule I of the Court Fees Act (VII of 1870). Subsequently an application was made for a refund of this amount on the ground. that the property in respect of which it had been paid was the joint property of the deceased and his sons and had passed to the latter by survivorship, and that,

therefore, under section 19 D of the Court Fees Act (VII of 1870) no duty was chargeable.

Held, that the refund could not be allowed. The section only applies where probate or letters of administration have already been granted on which the Court-fee has been paid. In such case no further duty is payable in respect of property held by the deceased as trustee. But where no duty has been paid the section does not apply. Here no letters of administration had been granted other than those in respect of which the refund was applied for. Therefore, there were no letters on which the Court-fee had been paid so as to bring the case within the section and to entitle the present letters of administration to exemption.

Held, also, that in the present case no letters of administration were necessary. The family property vested in the sons at once by survivorship (section 4 of Act V of 1881). But when the letters of administration were applied for, the applicant must be taken to have adopted the case of the Bank of Bombay, that so far as the sons were concerned the deposit was made by the decased, and that it was his estate. Having invoked the jurisdiction of the Court by means of that statement, the applicant could not be allowed to say that the statement was incorrect and that no letters of administration were necessary.

COLLECTOR OF AHMEDABAD v. SAVCHAND ... (1902) 27 Bom. 140
PROXY—Qualification of proxy—Memorandum of Association—Alteration of
Memorandum of Association, Act XII of 1895—Company—Articles of Association
—General meeting of shareholders.

See COMPANY

PUBLIC CONVEYANCES—Licenses of—Bombay Act VI of 1863, sec. 6—Licenses

—Power of Commissioner of Police to grant licenses—Discretion to refuse licenses

-Tower of Commissioner of Police to grant licenses—Discretion to refuse licenses

-Specific Relief Act (I of 1877), sec. 45—Practice.

See License

PUBLIC DUTY—Subordinate Government officer making a report to his superior

Negligence. See RAILWAY COMPANY. ...

See Railway Company

RAILWAY COMPANY—Carriage of goods—Contract—Formation of contract—Rules of Company for consignment of goods—Re-booking of goods after arrival at original destination—Instructions to station master to re-book.] The rules of a Railway Company prescribed certain procedure for the booking of goods. In accordance with those rules certain goods were booked from Trichinopoly to Bágalkot. The plaintiff requested A, the goods clerk and station master at Hotgi (on defendants' Railway), to have the goods re-booked from Báralkot to Hotgi, and for this purpose handed him the railway receipt with a written application, which, however, was not in the form of consignment used by the Company. A accordingly sent a service telegram to the station master at Báralkot asking him to re-book the goods. The station master there did not re-book the goods and they were delivered at Báralkot. The plaintiff sucd the Railway Company for damages for non-delivery at Hotgi.

· Held, that the defendant Company had not contracted with the plaintiff to carry the goods from Eagalkot to Hotgi. The mere fact that the plaintiff got A.

the station master at Hotgi, to send a service telegram to Bágalkot did not constitute a contract to bind the Company.

MALKARJUN SHIDAPA & SOUTHERN MARATHA RAILWAY

(1902) 27 Bom. 126

RAILWAY COMPANY—Negligence in construction of railway—Suit for damage to land by causing water to flood it—Indian Railways Act (IX of 1890), sees. 7-12—Acting in excess of statutory powers in construction of railway—Suit for damages.] The defendants, by the negligent construction of a railway made in exercise of their powers under the Indian Railways Act (IX of 1890), caused the plaintiff's land to be flooded in the rainy season and consequently damaged. That Act provides that a suit shall not lie to recover compensation for damage caused by the exercise of the powers thereby conferred, but that the amount of such compensation shall be determined in accordance with the Land Acquisition Act, 1870.

Held, it being shown that the defendants had exceeded or abused their statutory powers that the plaintiff's remedy was by suit for damages, and not for compensation under the Act.

Statutory powers under such an Act are to be exercised with ordinary care and skill and with some regard to the property and rights of others; they are granted on the condition, sometimes expressed and sometimes understood—expressed in the Railways Act of 1890, but if not expressed always understood—that the undertakers "shall do as little damage as possible in the exercise of their statutory powers."

Lawrence v. Great Northern Railway Company ((1851) 16 Q. E. 643); Broadbent v. Imperial Gas Company ((1857) 7 Dect. M. & G. 436): Bagnall v. London and North-Western Railway Company ((1861) 7 H. and N. 423); Ricket v. Metropolitan Railway Company ((1867) L. R. 2 Eng. and Ir. Ap. 175); and Geddis v. Proprietors of the Bann Reservoir ((1878) 3 Ap. Ca. 430) referred to.

· GAERWAR SARKAR OF BARODA v. GANDHI KACHRABHAI . (1903) 27 Bom. 344

Consignment of goods—Diversion of consignment while en route—Delivery to the original consignee—Liability of the Railway Company.] G booked a consignment of goods from the Sakrigali Ghat Station on the East Indian Railway to Rat Kamptee, a station on the Bengal-Nagpur Railway. Whilst the consignment was en route to Kamptee, G directed the railway servants at Sakrigali Ghat Station to notify to the station master at Kamptee to deliver the consignment to plaintiff at Nargaon. This direction was given, but disregarding the order the station master at Kamptee delivered the consignment to R at Kamptee. The plaintiff sued the East Indian Railway to recover compensation for loss of goods.

Held, that the Rallway Company was liable in damages: the case was a simple case of breach of contract; the defendant contracted to carry the goods and deliver them at Nargaon to the plaintiff and failed to do so.

Held, further, that the liability of the Railway Company was not affected by the fact that the station master at Kamptee acted wrongly in disregarding the instructions which he had received from Sakrigali Ghat Station.

Held, further, that a plea of failure to give notice under section 77 of the Indian Railway Act, 1890, urged for the first time in second appeal, and not supported by any evidence that such notice was not given, was taken too late. This could not be regarded as a stale demand as the suit was filed within two months after the cause of action arose.

Спилсандаце. East Indian Railway Company ... (1903) 27 Bom, 597 п 1615—7

	1 GENERAL INDEX.
	Pag REDEMPTION—Mortgage—Adverse possession as against mortgagor—Possession obtained under an agreement with mortgagee—Notice to mortgagor of such posses- sion—Limitation Act (XV of 1877), sch. II, art. 144.
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	—Clog on the equity of redemption—Agreement of sule of the mortgaged property subsequently to mortgage—Mortgage. See Mortgage
	Burden of proof on plaintiff Power come
	the same of the sa
	sec. 90—Documents thirty years old—Proper custody—Presumption—Registration—Constructive notice—Possession.] A registered document contained a recital of unregistered incumbrances, and a question having arisen as to whether the recital of the unregistered incumbrances amounted to notice,
The state of the s	under which the holders of registered documents derive title
	The defendants further relied on their being in actual possession. Possession amounts to notice of such different d
	Possession amounts to notice of such title as the person in possession may have, and any other person who takes a mortgage or other charge upon, or purchases, immoveable property without ascertaining the nature of the claim of the person in possession, does so at his own risk.
	possession is at least a very cogent evidence of notice which a purchaser cannot with safety disregard, and that section 50 of the Registration Act (III of 1877) cateris paribus it gives preference.
	Per Batty, J.—Section 90 of the Evidence Act (I of 1872) admits a presumption of the genuineness of documents purporting to be thirty years old, if produced from proper custody proved to have had a legitimate origin 'or' an It is not necessary that the documents shall be found in the best and most proper place of deposit. The section insists only on a satisfactory account of the origin of the custody and not on the history of its continuance.
	be produced from the proper custody.
• ** *** *** *** *** *** *** *** *** **	SHARFUDIN v. GOVIND (1903) 27 Bom, 452
	accompanied with possession—Subsequent sale by registered deed possession—Possession for purposes of notice equivalent to registration—Daty of purchaser to inquire as to nature of possession.] On the 16th June, 1876, Revapuri mortgaged the lands in suit to the first defendant with possession, and the latter on the 26th June, 1876, leased them to the second defendant for one year. The second defendant remained in possession as tenant after the year had expired. On the 3rd December, 1878, while defendant 2 was in possession of the lands as tenant, Revapuri sold to him (defendant 2) her equity of redemption for Rs. 95. The deed of sale was not compulsorily registrable under the Act then in force, and owing to the death of Revapuri it was not registered. On the 8th mortgage of 1876 by a registered deed to the plaintiff. At the date of this sale to the plaintiff the second defendant was still in actual possession. The plaintiff brought this suit to redeem the lands from the mortgage (defendant 1), and added defendant 2 as a party, alleging that he was in possession as a tenant of

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the first defendant. The lower Courts passed a decree for the plaintiff, holding that his registered deed gave him priority over the second defendant, whose deed was unregistered. On appeal.

Held (reversing the decree of the lower Courts), that the plaintiff's suit should be dismissed. Possession in certain cases, for the purposes of notice, has the same effect as registration. The plaintiff at the date of his purchase had notice of the possession of the second defendant, and that being so, it was the plaintiff's duty to inquire of the second defendant under what title he held, and if the plaintiff had done so, instead of assuming that the second defendant was still holding merely as tenant, he would have discovered that the second defendant had purchased the land.

KONDIBA v. NANA (1903) 27 Bom, 408

REGISTRATION ACT (III OF 1877), SECS. 49 AND 50—Void lease—Lessee's adverse possession—Unregistered lease—Admissibility in evidence—Evidence Act I of 1872, secs. 115 and 116—Landlord and tenant.

See Landlord and Tenant 515

RES JUDICATA—Civil Procedure Code (Act XIV of 1882), sec. 13—Suit for arrears of maintenance—Former suit for arrears for a different period—Surety—Continuing guarantee—Pleadings by surety denying liability in a suit do not operate as notice of revocation of suretyship—Contract (Act IX of 1872), sec. 130.] By a settlement executed in 1896 the first defendant agreed (inter alia) to pay maintenance to the plaintiff (his wife) at the rate of Rs 91 per annum. The second defendant signed the deed as surety. In 1898 the plaintiff sued both defendants to enforce her rights under the settlement and (inter alia) for arrears of maintenance for ten months and sixteen days from the 10th November, 1897. The defendants pleaded that the deed was void for want of consideration. The first Court found that the settlement was not void, and passed a decree against both the defendants, but as to the payment of arrears of maintenance the decree was against the first defendant only. The second defendant appealed against the decree so far as it was against him, contending that the settlement was not in any way binding on him. The plaintiff filed cross-objections to the decree, contending that the second defendant ought to have been held liable for the arrears of maintenance. At the hearing of the appeal, however, the plaintiff withdrew her cross-objections, and the decree of the first Court was confirmed with costs.

In 1901 the plaintiff filed this suit against both defendants to recover arrears of maintenance for two years and nine months, commencing from the 27th September 1898. The second defendant pleaded that, inasmuch as he had not been held liable for maintenance in the former suit, the plaintiff's claim was res judicata.

The lower Courts passed a decree for the plaintiff, holding that her claim was not res judicata. On appeal to the High Court,

Held, confirming the decree of the lower Courts, that the plaintiff's claim against the second defendant in this suit was not resjudicata. The only point that was resjudicata against her by the former suit was her right to the arrears therein claimed, but that did not bar her right to sue the second defendant as surety in respect of the subsequent arrears claimed in the present suit.

It was contended for the second defendant that the pleadings in the former suit operated as notice under section 130 of the Contract Act (IX of 1872), and put an end to his contract of guarantee.

Held, that the denial by the second defendant of his liability in the pleadings in that suit was made for the purposes of pleading and could not have any other effect than was given to it in the suit itself. It could not operate as notice under section 130 of the Contract Act.

BHIKABHAI v. BAI BEURI

... (1903) 27 Bom. 418

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	A question arose as to whe and void, there being nothin providing for the exercise by any powers conferred on the S	the Full Court mall Cause Cour	tramed under composed of t.	r section 9 a two or more	f the Act Judges of	p. 6
	Held, that though the rules Cause Court at Bombay were si of more than one Judge of any sittings of the Full Court we framed as to the procedure to become well-defined and fully should consist of two Judges-	7 powers under re therefore ult e followed, still known, the m	the Act, it does not be the Act, it does To the Act, it does To the Act, it does not be the Act, it do	Eull Court of the state of the process of the process of the process of the process of the state	consisting that the ules wore singe had	

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STAMP-Indian Stump Act (II of 1899), sch. I, arts. 23, 24-Conveyance-Havala Letter by a debtor anthorising payment to his creditor of money due to him (the debtor) by a third person. The defendant authorized the plaintiff, his creditor, to receive a sum of money on his behalf, due to him by the Panjrapol authorities at Bhiwandi, by a letter which ran as follows:

TO-THE DAROGA OF THE PANJEAPOL, Bhiwandi.

I, than bin Halia of Khoni, beg to apply that I have completely fulfilled the agreement to supply fodder for Samvat year 1956, and that the sum of Rs. 22, due to me on account, should be made over on my behalf to Shet Mangaldas Bhanji. He will sign on my behalf, and I consent to his doing so. This application for the havala is given in writing. It is requested you will accept it—6th March 1900. (Signed) GAU HALIA.

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This letter was written on an u ordinate Judge to ascertain the re	ınstamped quisite sta	paper. mp upon	On a referent	ence by the	Sub-	
Held, that as the document in ant to his creditor (plaintiff) in c within the definition of conveyar should be stamped as such.	question e	ffected a t	ransfer of p	(II of 1899)	and	
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one creditor - Good faith.] One	Byramji <i>I</i>	Cuverji di	ed in June,	tanse—Trans 1896, indebt	ed to	

several creditors. Immediately after his death his sons mortgaged his property to Moti Gelaji, one of his creditors. On the 11th August, 1897, another creditor, Jaitha Kupaji, obtained letters of administration to the estate of the deceased, and, as such administrator, sold the property to the son of the mortgagee, the latter having died. Subsequently the plaintiffs obtained a money decree against the estate and sued to establish their right to attach the property alleging that the sale was void under section 53 of the Transfer of Property Act (IV of 1882). The lower Appellate Court held that the purchase was for value and that there was no evidence of fraud, and it dismissed the suit. On second appeal,

Held, (affirming the decree) that the sale was valid. The fact that it was a sale of the whole of the property of the deceased to one of his creditors made no difference. The only question was whother the transaction was in good faith. The test of good faith in such cases is whether the transfer is a mere cloak for retaining a benefit to the granter. On the findings of the lower Court it appeared that in this case it was intended that the grantee should have the property and keep it.

NATHA v. MAGANCHAND (1903) 27 Bom. 322

TRANSFER OF PROPERTY ACT (IV OF 1882). Secs. 58, cls. (b), (d) and 98—Usu-fructuary mortgage—Simple mortgage—Anomalous mortgage—Suit by mortgagees for recovery of debt and in default of payment by mortgagors for fore-closure and possession.] A mortgage-deed (1) put the mortgagees in possession of the mortgaged property and authorized them to retain possession until payment of the mortgage-money, the mortgagors being given credit for all profits recovered from the mortgaged property over and above the Government assessment. (2) It also contained a personal covenant by the mortgagors to pay the mortgage-money and an implied agreement that in the event of non-payment the property should be sold (the debt to be recovered from the mortgaged land and from the persons and from other property of the mortgagors).

Some time after the date of the mortgage the mortgages let out the mortgaged property to the mortgagers for a certain term and before the expiration of the term, the mortgages brought a suit for the recovery of the debt and in default of payment by the mortgagors for foreclosure and possession.

Held, that owing to the provise (1), the mortgage was usufructuary within the meaning of clause (d) of section 58 of the Transfer of Property Act (IV of 1882), and owing to the provise (2), it was a simple mortgage under clause (b) of the section. The transaction was therefore an anomalous mortgage provided for by section 98 of the Act, being a combination of a simple mortgage and usufructuary mortgage. In such a case the rights and liabilities of the parties must be determined by the contract as evidence in the mortgage-deed and so far as such contract does not extend by local usage.

Held, further that though the plaintiffs were not entitled to regain possession, they having let out the property to the mortgagers for a term, still that circumstance did not affect the distinct and independent right of the plaintiffs to sue for the mortgage-money and to obtain a decree for sale of the mortgaged property.

AMARCHAND v. KILA MORAR ... (1903) 27 Bom. 600

bond—Meaning of the word "attested"—Attestation in the presence of the mortgager after having received from him a personal acknowledgment of his signature.] A mortgage-bond was signed by the mortgager, was attested by three witnesses and was duly registered. In a suit for the mortgage-debt it appeared from the evidence that none of the attesting witnesses had actually seen the execution of the deed by the mortgager, but must have attested merely on the mortgagor's admission of his signature. The lower Courts held that this was not sufficient under section 59 of the Transfer of Property Act (IV of 1882), and that the mortgage was, therefore, invalid. On appeal to the High Court,

Held, that the attestation was sufficient. A mortgage-deed is attested within the meaning of section 59 where the witnesses have signed it in the presence of the mortgagor after having received from him a personal acknowledgment of his signature.

Abdul Karim v. Salimun ((1899) 27 Col. 190) dissented from.

Ramji Haribhai v. Bai Parvati ... (1902) 27 Bom. 91

TRANSFER OF PROPERTY ACT (IV OF 1882), SECS. 83, 84 AND 103—Mortgage—Redemption—Interest on mortgage-debt—When interest ceases to run—Deposit by mortgagor under sec. 83 of Transfer of Property Act (IV of 1882)—Duty of mortgagor making such deposit when mortgage is a minor—Appointment of guardian ad litem.] On the 25th October, 1893, the plaintiff passed a mortgage deed to the defendant, which provided that in case of redemption the mortgagor should pay interest for the whole year in which such redemption should take place. On the 12th October, 1899, the mortgagor, with a view to redeem, deposited in Court, under section 84 of the Transfer of Property Act (IV of 1882), the sum of Rs. 2,000 which was the whole amount due on the mortgage for the then current year ending 24th October, 1899. The mortgage was then dead, and his son and heir was a minor, and it was therefore necessary that a guardian ad litem should be appointed to receive notice of the deposit as required by section 8°. Steps were accordingly taken to appoint the minor's mother and on the 18th November, 1899, she was duly appointed guardian ad litem. Notice was then served upon her, calling on her why she should not receive the deposit. The notice was made returnable on the 9th December, 1899, on which day she refused to accept the deposit, on the ground that it did not include the interest which had accrued due for the year commencing 25th October, 1899. The deposit was consequently returned to the plaintiff, who then filed this suit for redemption. The Suberdinate Judge passed a decree directing redemption on payment to the defendant of Rs. 2,000 and also interest for the year commencing 25th October, 1899. The District Judge varied this decree, refusing to give the additional interest, holding that "on making the deposit the plaintiff (mortgagor) had done all that had to be done by him." to enable the defendant to take the deposit out of Court as provided by section 84 of the Transfer of Property Act (IV of 1882) and that therefore interest had ce

Held, (reversing the decree) that the defendant (mortgagee) was entitled to the additional interest. The defendant (mortgagee) was a minor. It was therefore requisite that a guardian ad litem should be appointed both to receive service of the notice of deposit under section S3 and to take the deposit out of Court. It could not be said that the mortgager (plaintiff) had completely performed his part until he had procured the appointment of a guardian ad litem for the above purpose. This was not done prior to the 25th October, 1899. Consequently the mortgagee was entitled under the mortgage to the interest for the year commencing on that day.

PANDURANG v. MAHADAJI

... (1902) 27 Bont.

Lease-Tenant holding over-Assent of landlord-Inability of rent after capity of term.

See LANDLORD AND TENANT

... 202

TRUSTEE—Trust property—Wakf—Land held on condition of service—Alternation—Limitation—Limitation Act (XV of 1877), sel. II, art. 184.

See LIMITATION ACT

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VATAN-Adoption of a person not a member of the Vatantar family-Gordon Settlement-Vatan Act (Bom. Act III of 1874).] A sained with respect to extan property which was subject to the Gordon Settlement contained the following a clauses:

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2nd.—No nazrána or other demand on account of the succession of heir limits of the Vatandar family, and per hereafter be obtained from Governmen	mission t	o make suc	h adoption	within the
3rd.—When all the change con	6.			Heer Hot
3rd.—When all the sharers of the privilege of adopting at any time an who can be legally adopted, will be grapayment from that time forward in per in each rupee of the above total emolum. It was contended at the state of the same and the same are supplied to the same are	nted by	Government	est it, then striction as to the vat	the general to family) an on the
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Vatandar family in respect to whose vat Held, that the sanad did not prohibit in question was valid.	an the sa	id sanad was	granted, w	ong to the as invalid.
LAMUHANDRA DESTRANT	77 T.			
WAIVER—Limitation Act (XV of 1877), so decree—Default in payment of instalment of overdue instalments.	ch. II, ar	t. 179—Inst	NDRA (1902) $alments-I$) 27 Bom. 75
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See HINDU LAW				owings or
WILL - Executor - Probate - Probate granted have not proved may call for inventory proved and are managing the estate.	to some of	of the execute	ors—Execu	485 fors who
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